ONTARIO
LABOUR RELATIONS BOARD
REPORTS

July/August 2012

Ontario

ONTARIO LABOUR RELATIONS BOARD

Chair	B. FISHBEIN
Alternate Chair	D. GEE
Vice-Chairs	C.J. ALBERTYN
	I. ANDERSON
	M.E. CUMMINGS
	H. FREEDMAN
	M. GREEN
	J. HAYES
	C. HUMPHREY
	N. JESIN
	L. KANEE
	P. KELLY
	R.KITCHEN
	J. LEWIS
	T. McDERMOTT
	D.A. McKEE
	M.A. McKELLAR
	B. McLEAN
	G. MISRA
	Y. MOHAMED
	C. MURRAY
	C. ROWAN
	C. SCHMIDT
	S. SERENA
	L. SHOULDICE
	M. SILVERMAN
	J. SLAUGHTER
	L. STEINBERG
	T. WACYK
	K. WADDINGHAM
	M. WILSON
Members	R. BAXTER
	A. HAWARD
	P. LeMAY
	S. McMANUS
	R. O'CONNOR
	R. O'ROURKE
	D. PATTERSON
	C. PHILLIPS
	J. RUNDLE
	J. SCHEL
Director/Registrar	P. GALLUS
Deputy Registrar	C. GILBERT
Board Solicitors	V. STELMASZYNSKI
	L. MARVY

ONTARIO
LABOUR RELATIONS BOARD
REPORTS

A Bimonthly Series of Decisions from the
Ontario Labour Relations Board

Cited [2012] OLRB REP. JULY/AUGUST

EDITORS: VOY STELMASZYNSKI
LEONARD MARVY

CASES REPORTED

		PAGE
1.	1180240 Ontario Inc. o/a Joey's Only Seafood; Re Penny Wilks, Willow Walker, Aline Heimbuch, Alicja Dwozak, Lia Carrier, Allisha Peever, Samantha Quilty, Denra Slipp, Alissa Crossley, Roselle Noordyk, Tracie Boone, Kendra Dearlove, Deanna Winn; Re Director of Employment Standards	573
2.	450477 Ontario Limited operating as Chartrand Equipment; Re Jean-Louise Albert, et al and Director of Employment Standards	577
3.	Accqcorp; Re Jennifer Matthie, Marilynne McDonald and Melanie Wegler, Inspectors	579
4.	Bayshore Home Health; Re Ontario Nurses' Association; Re Bayshore Home Health, Sarnia; Re Bayshore Home Health, Chatham; Re Victorian Order of Nurses Sarnia-Lambton; Re Victorian Order of Nurses Chatham-Kent; Re Erie St. Clair Community Care Access Centre	584
5.	Communications, Energy and Paperworkers Union of Canada and its Local 7-0-1; Re Dilico Anishinabek Family Care	596
6.	Defense Contract Management Agency – Americas (Canada); Re Public Service Alliance of Canada	603
7.	Dineen Construction Limited; Re Universal Workers Union, Labourers' International Union of North America, Local 183; Re International Brotherhood of Painters and Allied Trades, District Council 46; Re Monalt Environmental Inc.	626
8.	Gail Myles; Re Alliance Employees Union (AEU); Re Union of National Employees	633
9.	Hamilton Health Sciences Corporation; Re Canadian Union of Public Employees Local 4800; Re Sodexo MS Canada Limited	645
10.	Hydro One Inc.; Re Canadian Union of Skilled Workers	688
11.	Hydro One Networks Inc.; Re Canadian Union of Skilled Workers	697
12.	James Dick Construction Limited, James Dick Holdings Limited, Caledon Sand & Gravel Inc., Hamilton Ready Mix Ltd., Assinck Limited; Re Labourers' International Union of North America, Local 506	708
13.	Kleenway Building Maintenance Services Inc.; Re Labourers' International Union of North America, Local 1059	725

14. Ledcor CMI Limited; Re United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers); Re Construction Workers Local 52 Affiliated With The Christian Labour Association of Canada 731

15. Organix Matters Inc.; Re Director of Employment Standards 735

16. Professional Carpentry Ltd.; Re The Carpenters' District Council of Ontario; Re United Brotherhood of Carpenters and Joiners of America, on its own behalf and on behalf of its Local Union, Carpenters and Allied Workers, Local 27,; Re Universal Workers Union, Labourers' International Union of North America, Local 183; Re Aspen Ridge Homes Ltd.; Re Dole Contracting Inc. 739

17. Tok Transit Limited; Re Tok Transit Limited, The Regional Municipality of York and Bill Fisch; Re United Food & Commercial Workers, Local 206; Re Amalgamated Transit Union, Local 113 747

COURT PROCEEDINGS

1. Greater Essex County District School Board; Re United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of The United States and Canada, Local 552; Re Ontario Labour Relations Board..... 756

SUBJECT INDEX

Bargaining Rights – Bargaining Unit – *Public Sector Labour Relations Transition Act* – Previously the Board had determined that the creation of clinics in Sarnia and Chatham-Kent for ambulatory clients constituted a "health services integration" under *PSLRTA* and declared that PSLRTA applied – Nursing services to these ambulatory clients were previously provided on a home care basis by VON-Sarnia and VON-Chatham-Kent, for whom ONA held bargaining rights - Bayshore, a non-union employer, was the successful bidder to provide services to ambulatory clients through the clinics – The issue now before the Board under s. 22 of *PSLRTA* was the bargaining unit appropriate to Bayshore's operations after the health services integration having regard to the purposes of PSLRTA– Bayshore took the position that a bargaining unit restricted to the transferred service was appropriate, i.e. full-time RNs at the Clinics – ONA adopted the facts stated by Bayshore in response to a subsequent application for certification by another union, and argued that a bargaining unit of all RNs and all RPNs was appropriate to Bayshore's operations, given the high degree of integration of their work, terms and conditions of employment and supervision – The Board first noted that s. 22 does not confer bargaining rights upon a bargaining agent; rather section 23 requires a vote and where 40% or more of the bargaining unit were not represented by a bargaining agent, as was the instant case, "no union" had to be an option on the ballot – Whether or not ONA's bargaining rights with respect to the transferred services were preserved was incidental to the determination of what bargaining unit was appropriate for Bayshore's operations – Based on the facts stated by Bayshore in the other application, and not disavowed by Bayshore in this application, the Board found that a bargaining unit of all RNs and RPNs was appropriate to Bayshore's operations – Consideration of the four purposes of *PSLRTA* did not change this result, given the degree of integration of RNs and RPNs in Bayshore's operations: 1) a bargaining unit of all RNs and RPNs is more likely to "encourage best practices that ensure delivery of quality and effective public services that are affordable for taxpayers" 2) there were no other bargaining units to be rationalized and the bargaining unit consisting of RNs and RPNs would result in effective collective bargaining structures; 3) either bargaining unit will come into effect only if a majority of the employees in the bargaining unit vote that they wish to be represented by ONA, however, only the bargaining unit consisting of all RNs and all RPNs would facilitate collective bargaining and 4) although integrating RNs and RPNs may reduce workplace disputes in the future, permitting the expansion of bargaining rights, absent agreement of the parties may not – The Board found however that this last concern gave way to all the other factors and determined the bargaining unit appropriate for Bayshore encompasses all RNs and RPNs – Matter continues

BAYSHORE HOME HEALTH; RE ONTARIO NURSES' ASSOCIATION; RE BAYSHORE HOME HEALTH, SARNIA; RE BAYSHORE HOME HEALTH, CHATHAM; RE VICTORIAN ORDER OF NURSES SARNIA-LAMBTON; RE VICTORIAN ORDER OF NURSES CHATHAM-KENT; RE ERIE ST. CLAIR COMMUNITY CARE ACCESS CENTRE 584

Bargaining Rights – Jurisdictional Dispute – Conciliation – Reference – Voluntary Recognition – The Minister of Labour asked the Board whether she has the authority to appoint a conciliation officer in this matter, involving a bargaining unit of employees who work at various Dilico Anishinabek Family Care ("Dilico") centres – The Union obtained bargaining rights from the Canada Industrial Relations Board ("CIRB") Dilico participated in the CIRB proceedings but always objected to CIRB jurisdiction over its labour relations – The Union issued notice to bargain a second renewal of the collective agreement, followed by a request to the Ontario Ministry of Labour for the appointment

of a Conciliation Officer, both of which were objected to by Dilico – Dilico argued that it had never voluntarily recognized the union, that the union was never certified by the Board, and that Dilico had only engaged in bargaining because the Union had previously obtained those rights from the CIRB The Union argued that Dilico's voluntary recognition for the Union was a product of the first collective agreement and was confirmed by the execution of the second collective agreement – Assuming, without deciding, that the Board has jurisdiction over the labour relations of Dilico, the Board stated that the voluntary recognition provision provides an alternative route to the normal certification procedures and that the language of the statute contemplates intention – Dilico's lack of intention was manifest throughout and their participation in the CIRB proceedings should not be seen as voluntary – Additionally, the Union was never certified by the Board – Accordingly, the Union had no legal right to serve an enforceable notice to bargain, which is a prerequisite to the appointment of a conciliation office by the Minister – The question referred to the Board is answered in the negative

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA AND ITS LOCAL 7-0-1; RE DILICO ANISHINABEK FAMILY CARE 596

Bargaining Unit – Bargaining Rights – *Public Sector Labour Relations Transition Act* – Previously the Board had determined that the creation of clinics in Sarnia and Chatham-Kent for ambulatory clients constituted a "health services integration" under *PSLRTA* and declared that PSLRTA applied – Nursing services to these ambulatory clients were previously provided on a home care basis by VON-Sarnia and VON-Chatham-Kent, for whom ONA held bargaining rights - Bayshore, a non-union employer, was the successful bidder to provide services to ambulatory clients through the clinics – The issue now before the Board under s 22 of *PSLRTA* was the bargaining unit appropriate to Bayshore's operations after the health services integration having regard to the purposes of PSLRTA– Bayshore took the position that a bargaining unit restricted to the transferred service was appropriate, i.e. full-time RNs at the Clinics – ONA adopted the facts stated by Bayshore in response to a subsequent application for certification by another union, and argued that a bargaining unit of all RNs and all RPNs was appropriate to Bayshore's operations, given the high degree of integration of their work, terms and conditions of employment and supervision – The Board first noted that s. 22 does not confer bargaining rights upon a bargaining agent; rather section 23 requires a vote and where 40% or more of the bargaining unit were not represented by a bargaining agent, as was the instant case, "no union" had to be an option on the ballot – Whether or not ONA's bargaining rights with respect to the transferred services were preserved was incidental to the determination of what bargaining unit was appropriate for Bayshore's operations – Based on the facts stated by Bayshore in the other application, and not disavowed by Bayshore in this application, the Board found that a bargaining unit of all RNs and RPNs was appropriate to Bayshore's operations – Consideration of the four purposes of *PSLRTA* did not change this result, given the degree of integration of RNs and RPNs in Bayshore's operations: 1) a bargaining unit of all RNs and RPNs is more likely to "encourage best practices that ensure delivery of quality and effective public services that are affordable for taxpayers" 2) there were no other bargaining units to be rationalized and the bargaining unit consisting of RNs and RPNs would result in effective collective bargaining structures; 3) either bargaining unit will come into effect only if a majority of the employees in the bargaining unit vote that they wish to be represented by ONA, however, only the bargaining unit consisting of all RNs and all RPNs would facilitate collective bargaining and 4) although integrating RNs and RPNs may reduce workplace disputes in the future, permitting the expansion of bargaining rights, absent agreement of the parties may not – The Board found however that this last concern gave

way to all the other factors and determined the bargaining unit appropriate for Bayshore encompasses all RNs and RPNs – Matter continues

BAYSHORE HOME HEALTH; RE ONTARIO NURSES' ASSOCIATION; RE BAYSHORE HOME HEALTH, SARNIA; RE BAYSHORE HOME HEALTH, CHATHAM; RE VICTORIAN ORDER OF NURSES SARNIA-LAMBTON; RE VICTORIAN ORDER OF NURSES CHATHAM-KENT; RE ERIE ST. CLAIR COMMUNITY CARE ACCESS CENTRE 584

Build-Up – Certification – Fraud – Intervenor – Reconsideration – Termination – Unfair Labour Practice – The Amalgamated Transit Union, Local 113 ("the ATU") intervened on a request for reconsideration of a certificate granted to the United Food & Commercial Workers, Local 206 ("the UFCW") with respect to transit operators employed by Tok Transit Limited – Additionally, the ATU filed an application for termination of the UFCW's bargaining rights on the basis of fraud and an unfair labour practices complaint – The ATU sought additional remedies beyond the revocation of the UFCW's certificate and the voiding of its collective agreement: namely, a Board direction to Tok Transit to file a notice setting out an accurate estimate of the number of employees in the bargaining unit at the completion of the alleged build-up; a dismissal of the application for certification for not attaining at least 40 per cent support in the built-up unit; and, an order for an additional vote with the ATU added to the ballot – The Board first considered whether the ATU had standing to intervene – The ATU argued that they had a necessary interest on the basis that the members represented by the ATU are substantially more than those members who constituted the initial bargaining unit – The UFCW submitted that the mere fact that the ATU has members among Tok Transit employees is insufficient to give the ATU standing – The Board determined that the ATU was not raising the issue of build-up for the purpose of delaying the vote; rather it was contending that the UFCW and Tok Transit concealed the fact of the build-up and the true numbers of individuals in the bargaining unit – On that basis, the Board granted party status to the ATU – Prior to determining the request for reconsideration, the Board requested further submissions from the parties addressing the unusual remedies requested by the ATU – Matter continues.

TOK TRANSIT LIMITED; RE TOK TRANSIT LIMITED, THE REGIONAL MUNICIPALITY OF YORK AND BILL FISCH; RE UNITED FOOD & COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 113 747

Certification – Build-Up – Fraud – Intervenor – Reconsideration – Termination – Unfair Labour Practice – The Amalgamated Transit Union, Local 113 ("the ATU") intervened on a request for reconsideration of a certificate granted to the United Food & Commercial Workers, Local 206 ("the UFCW") with respect to transit operators employed by Tok Transit Limited – Additionally, the ATU filed an application for termination of the UFCW's bargaining rights on the basis of fraud and an unfair labour practices complaint – The ATU sought additional remedies beyond the revocation of the UFCW's certificate and the voiding of its collective agreement: namely, a Board direction to Tok Transit to file a notice setting out an accurate estimate of the number of employees in the bargaining unit at the completion of the alleged build-up; a dismissal of the application for certification for not attaining at least 40 per cent support in the built-up unit; and, an order for an additional vote with the ATU added to the ballot – The Board first considered whether the ATU had standing to intervene – The ATU argued that they had a necessary interest on the basis that the members represented by the ATU are substantially more than those members who constituted the initial bargaining unit – The UFCW

submitted that the mere fact that the ATU has members among Tok Transit employees is insufficient to give the ATU standing – The Board determined that the ATU was not raising the issue of build-up for the purpose of delaying the vote; rather it was contending that the UFCW and Tok Transit concealed the fact of the build-up and the true numbers of individuals in the bargaining unit – On that basis, the Board granted party status to the ATU – Prior to determining the request for reconsideration, the Board requested further submissions from the parties addressing the unusual remedies requested by the ATU – Matter continues.

TOK TRANSIT LIMITED; RE TOK TRANSIT LIMITED, THE REGIONAL MUNICIPALITY OF YORK AND BILL FISCH; RE UNITED FOOD & COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 113 747

Certification – Interim Relief – Practice and Procedure – Unfair Labour Practice – The Labourers sought interim reinstatement of K – As the employer conceded there was a serious issue to be tried and the circumstance occurred during an organizing campaign, the remaining issues were irreparable harm and balance of harm, and whether the termination of K was unrelated to the exercise of rights under the Act – Procedurally, the Board struck a reply declaration as it did not comply with Rule 19.3 (it was neither in response to a new issue which the applicant had no opportunity to address nor did it address issues the applicant could not have reasonably anticipated) – On the merits, the Board accepted the information in the ten declarations by the employer that no employee had asked about K's termination, nor had any employee indicated any understanding or belief that the end of K's employment with the Company was in any way connected to his support for the union organizing campaign – Additionally, the Board noted the timing of a number of events (including K's termination occurring 1 ½ months after the union represented to the employer and the Board that the campaign was dead) did not favour an inference that the employer knew K was a union organizer – The Board found nothing pleaded by the applicants that K's termination had caused irreparable harm or a "chilling effect" on the workplace – Accordingly, the interim application was dismissed

JAMES DICK CONSTRUCTION LIMITED, JAMES DICK HOLDINGS LIMITED, CALEDON SAND & GRAVEL INC., HAMILTON READY MIX LTD., ASSINCK LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506 708

Certification – Parties – Reconsideration – *State Immunity Act* – The Board previously granted DCMA's request to reconsider its decision certifying PSAC and directed a hearing to hear the evidence with respect to DCMA's claim for sovereign immunity under the *State Immunity Act* – The two issues were whether: 1) DCMA submitted (or attorned) to the jurisdiction of the OLRB as specifically contemplated by s. 4 of the *SIA*; and 2) the "commercial activity" exception to immunity applied, as specifically contemplated by s. 5 of the *SIA* – On the first issue the Board noted that an entity entitled to immunity that unknowingly takes a step in a proceeding can only escape having attorned to the authority of the court if the facts "could not reasonably have been ascertained" – The Board found the following occurred: PSAC served the certification application on the Commander, who was an individual who had authority to enter into agreements; the Commander consulted with DCMA's own counsel in Virginia; a Response was filed which raised substantive issues, explicitly acknowledged it was an agency of the US Department of Defence, it agreed to a vote and where it would be conducted, proposed individuals as scrutineers and filed schedules of employees; it participated in the vote and sought to add its counsel to the list of people being contacted; participated by

teleconference in the counting of the ballots; and participated in further discussions – Only several days later, in post vote representations does the DCMA raise the issue of sovereign immunity – Given all this involvement by the DCMA, the Board was not prepared to accept that these actions were taken without the knowledge of the rights being waived – Having found that DCMA waived immunity, the Board went on to determine the "commercial activity" exception – The Board noted that the DCMA is "responsible in ensuring the integrity of contractual processes providing a broad range of contract procurement management services," and although it is weapons that are being purchased, the DCMA neither negotiates nor awards the contracts, but just monitors the implementation of the contracts – The Board was not convinced that sovereign activity was "insuring that you get what you bought, on time and for the negotiated price – which is what DCMA does" – The Board found that the connection was not too tenuous to create the requisite nexus for commercial activity to be brought into play, particularly when to hold otherwise would be to deprive Canadian workers, working on Canadian soil, the benefits of Canadian law; when American employees of DCMA are already represented in collective bargaining by a trade union and when the Commander in testimony acknowledged he could manage if the employees were engaged in collective bargaining – Accordingly the Board concluded that if DCMA has not waived its state immunity and attorned to the jurisdiction of the Board, then it is not immune pursuant to s. 5 of the *SIA* because these proceedings related to a commercial activity – Interim Certificate issued

DEFENSE CONTRACT MANAGEMENT AGENCY – AMERICAS (CANADA); RE PUBLIC SERVICE ALLIANCE OF CANADA 603

Collective Agreement – Construction Industry Grievance – The Union filed grievances claiming that the employer had violated the collective agreement by failing to transfer two grievors closer to their regular residences – The issue before the Board was the interpretation of Article 802 C of the collective agreement which states that 'The Employer will make every reasonable effort to transfer employees as near as possible to their regular residences as work permits' – The Union argued that there was plenty of work available in the requested zone and that the employer failed to make 'every reasonable effort' to transfer W and A closer to their respective regular residences – The employer argued that the words 'as work permits' means that the employer only has to make every reasonable effort if there is a lack of work in the zone the employee is transferring from and there is work available in the requested zone – The employer submitted that at the time of the request, they had lost experienced workers and could not afford to transfer out any workers – The Board held that Article 802 C of the collective agreement includes not only an assessment by the employer of available work in the requested zone, but also the amount of work in the zone from which the transfer would be made – The Board dismissed A's grievance on the basis that a verbal request for a transfer is insufficient to engage Article 802 C – The Board dismissed W's grievance on the basis that it was not possible for the employer to accommodate a transfer as it had very recently experienced the loss of a number of journeyman electricians in the zone from which A wished to transfer – Grievances dismissed

HYDRO ONE NETWORKS INC.; RE CANADIAN UNION OF SKILLED WORKERS 697

Collective Agreement – First Contract Arbitration – Following a direction from the Board for the settlement of a first collective agreement by arbitration, the parties returned to the Board to have their differences adjudicated – The only outstanding issues for resolution were wage rates and the number of hours required to qualify for benefits coverage –The Board accepted the union's submissions that the Board's role was to effect an agreement

that was "fair and reasonable" and would be "comparable to others in the same industry and geographic area," applying an objective standard – The employer, having terminated a contract with a predecessor cleaner company, attempted to introduce reduced wage rates and a higher threshold (minimum hours) of eligibility for benefits coverage – The Board specifically rejected the employer's argument that "ability to pay" should be a consideration – The Board found that the union's proposals reflected the terms of the collective agreement with the predecessor cleaner company when the contract was terminated – Those terms could hardly be described as "breakthrough" – Collective agreement ordered

KLEENWAY BUILDING MAINTENANCE SERVICES INC.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059 725

Conciliation – Jurisdictional Dispute – Bargaining Rights – Reference – Voluntary Recognition – The Minister of Labour asked the Board whether she has the authority to appoint a conciliation officer in this matter, involving a bargaining unit of employees who work at various Dilico Anishinabek Family Care ("Dilico") centres The Union obtained bargaining rights from the Canada Industrial Relations Board ("CIRB") Dilico participated in the CIRB proceedings but always objected to CIRB jurisdiction over its labour relations – The Union issued notice to bargain a second renewal of the collective agreement, followed by a request to the Ontario Ministry of Labour for the appointment of a Conciliation Officer, both of which were objected to by Dilico – Dilico argued that it had never voluntarily recognized the union, that the union was never certified by the Board, and that Dilico had only engaged in bargaining because the Union had previously obtained those rights from the CIRB – The Union argued that Dilico's voluntary recognition for the Union was a product of the first collective agreement and was confirmed by the execution of the second collective agreement – Assuming, without deciding, that the Board has jurisdiction over the labour relations of Dilico, the Board stated that the voluntary recognition provision provides an alternative route to the normal certification procedures and that the language of the statute contemplates intention – Dilico's lack of intention was manifest throughout and their participation in the CIRB proceedings should not be seen as voluntary – Additionally, the Union was never certified by the Board Accordingly, the Union had no legal right to serve an enforceable notice to bargain, which is a prerequisite to the appointment of a conciliation office by the Minister – The question referred to the Board is answered in the negative

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA AND ITS LOCAL 7-0-1; RE DILICO ANISHINABEK FAMILY CARE 596

Construction Industry Grievance – Collective Agreement – The Union filed grievances claiming that the employer had violated the collective agreement by failing to transfer two grievors closer to their regular residences – The issue before the Board was the interpretation of Article 802 C of the collective agreement which states that 'The Employer will make every reasonable effort to transfer employees as near as possible to their regular residences as work permits' – The Union argued that there was plenty of work available in the requested zone and that the employer failed to make 'every reasonable effort' to transfer W and A closer to their respective regular residences – The employer argued that the words 'as work permits' means that the employer only has to make every reasonable effort if there is a lack of work in the zone the employee is transferring from and there is work available in the requested zone – The employer submitted that at the time of the request, they had lost experienced workers and could not afford to transfer out any workers – The Board held that Article 802 C of the collective agreement includes not only an assessment by the employer of available work in the requested zone, but also the

amount of work in the zone from which the transfer would be made – The Board dismissed A's grievance on the basis that a verbal request for a transfer is insufficient to engage Article 802 C – The Board dismissed W's grievance on the basis that it was not possible for the employer to accommodate a transfer as it had very recently experienced the loss of a number of journeyman electricians in the zone from which A wished to transfer – Grievances dismissed

HYDRO ONE NETWORKS INC.; RE CANADIAN UNION OF SKILLED WORKERS 697

Construction Industry Grievance – CUSW sought payment for travel time for some of its employees when Hydro One provided transportation for the employees but required one of them to drive the vehicle from the worksite to the agreed-upon assembly point – The Board found no ambiguity in the language of the collective agreement: Hydro One's provision of "transportation" in the form of a vehicle parked for the employees' use, with no one to operate it, meant that one of the employees had to effectively be employed as a driver – Grievance allowed

HYDRO ONE INC.; RE CANADIAN UNION OF SKILLED WORKERS..... 688

Construction Industry Grievance – Judicial Review – Timeliness – The Board had originally held that it had the discretion to accept a grievance referral under s. 133 of the Act, notwithstanding the language in the collective agreement that deemed a grievance filed beyond 14 days to be settled – On judicial review, applying a standard of reasonableness, the Divisional Court quashed the Board's determination: [2011] OLRB Rep September/October 629 – On appeal, the Court of Appeal upheld the Divisional Court ruling: the Board had to apply the terms of the collective agreement which deemed the grievance settled if it was not referred to arbitration within 14 days — The Court said the Board did not have the right to ignore the express terms of the collective agreement that addressed the grievance and arbitration procedures – Appeal dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE ONTARIO LABOUR RELATIONS BOARD..... 756

Construction industry Grievance – Jurisdictional Dispute – Practice and Procedure Reconsideration – The Labourers sought reconsideration of a Board decision deferring the adjudication of a grievance pending the outcome of a jurisdictional dispute, arguing that the grievance relating to the sub-contracted work was insufficient to trigger a jurisdictional dispute, or insufficient to allow the jurisdictional dispute to take primacy over the grievance referral and cause it to be deferred – The Board held that its longstanding jurisprudence clearly suggests that a multi-party dispute is much more efficiently and effectively addressed through the jurisdictional dispute process – The Labourers will not be deprived of their collective agreement argument when the underlying issue of the jurisdictional dispute is heard – Reconsideration denied; briefs ordered

DINEEN CONSTRUCTION LIMITED; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 46; RE MONALT ENVIRONMENTAL INC. 626

Duty of Fair Representation – Remedies – Among other complaints the applicant alleged that her union failed to advise employees as part of the ratification process that the employer had given notice during collective bargaining of its intention to revert to the strict language of the collective agreement with respect to an article in the collective agreement addressing entitlement to work at home – The article required employees to request prior approval, although the employer had been allowing employees, such as the complainant, to work from home for some time without seeking prior approval – The employer did advise the union that it intended to strictly enforce the work at home article, however during the course of two ratification procedures the union did not advise the employees of the notice given by the employer – The Board found that this was not a case of an inadvertent mistake having been made in the material circulated during the ratification process, but rather a case of a complete absence of communication regarding the elimination of a term or condition of employment during a critically important part of the collective bargaining process – The Board found the failure of the union to advise employees that the employer was going to eliminate a term and condition of employment that they had enjoyed for a number of years reflected a complete disregard for the critical consequences to employees and undermined the statutory purpose of requiring ratification votes, and accordingly the failure was arbitrary and a breach of s. 74 – Concerning remedy the Board found that the complainant lost the opportunity to discuss the matter with fellow employees, which may or may not have gotten the issue back to the bargaining table and may or may not have resulted in some change – The Board advised the parties that it saw this as a mere loss of opportunity which will only attract nominal damages and remained seized to address damages if the parties could not agree on the quantum – Declaration made; Application granted in part

GAIL MYLES; RE ALLIANCE EMPLOYEES UNION (AEU); RE UNION OF NATIONAL EMPLOYEES 633

Employment Standards – Practice and Procedure – The employer sought leave of the Board to dispense with service of its application on several hundred employees, and permission to make payment of the substantial order in instalments beyond the 30-day limit for filing the appeal – In the circumstances of this case, the Board relieved the employer of the obligation to serve each employee individually, requiring the employer to post its application and the Board's decision in the workplace (subject to personal delivery to employees no longer part of the employer's workforce) – With respect to the payment of the order into trust, the Board affirmed that historically it has not exercised its discretion to extend the time for filing until the full payment has been made – The Board stated, however, that if the employer paid the full amount of the order in accordance with its proposed schedule, it is likely that the Board will exercise its discretion to extend the time for filing to the date of the final payment – Matter proceeds

450477 ONTARIO LIMITED OPERATING AS CHARTRAND EQUIPMENT; RE JEAN-LOUISE ALBERT, ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS 577

Employment Standards – The employer appealed an Employment Standards Officer's Compliance Orders for public holiday pay and an order to pay employees at the prescribed minimum wage The issue was whether servers who served alcohol infrequently at a licensed restaurant should be paid the standard minimum wage of $10.25 or the liquor server minimum wage of $8.90 per hour set out in s. 5(1) of Ontario Regulation 285/01 – The lower wage rate applies to an employee who serves liquor "as a *regular* part of his or her employment" – The Director of Employment Standards (DES) argued that an interpretation of the word *regular* should include the context of the

employer's business: if the sale of liquor is an insignificant part of the business, then the liquor server minimum wage should not apply – The employer countered that the liquor service is a regular part of the servers' employment as the restaurant is licensed and its employees are required to serve alcohol upon request – The Board rejected DES' argument and determined that the volume of liquor sales is irrelevant – The central question for the Board was whether the serving of alcohol was a regular part of the servers' employment – The evidence was that alcohol sales, though low, occurred almost every day – The application was allowed and the Compliance Orders rescinded – The Board ordered DES to return the money paid into trust, including the administrative fee, to the Employer

1180240 ONTARIO INC. O/A JOEY'S ONLY SEAFOOD; RE PENNY WILKS, WILLOW WALKER, ALINE HEIMBUCH, ALICJA DWOZAK, LIA CARRIER, ALLISHA PEEVER, SAMANTHA QUILTY, DENRA SLIPP, ALISSA CROSSLEY, ROSELLE NOORDYK, TRACIE BOONE, KENDRA DEARLOVE, DEANNA WINN; RE DIRECTOR OF EMPLOYMENT STANDARDS 573

Employment Standards – The employer, which provides manure transporting and spreading services to farms, took the position that it was exempt from the overtime and maximum hours provisions in the Act, in that it met the requirements prescribed in s. 2(2) of O Reg 285/01 which exempts farmers from those sections – The Board noted that in order to meet the requirements of the Regulation the employer's employees must be "employed on a farm" and their employment must be "directly related to the primary production" of one or more of a number of farming categories – Although noting that the employees did not have a direct employment relationship with the farmer, the Board did not decide whether the employees were employed on a farm, given its conclusion that the employer was not involved in the primary production of farming – The Board found that Organix's work did not involve direct contact with any of the agricultural products listed in the regulation; it did not seed, tend, grow or harvest an agricultural product; and it collected and moved manure and prepared soil so that others may engage in the primary production of agricultural products – The Board found Organix's work to be ancillary to the primary production of farm produce – Compliance order confirmed

ORGANIX MATTERS INC.; RE DIRECTOR OF EMPLOYMENT STANDARDS 735

First Contract Arbitration – Collective Agreement – Following a direction from the Board for the settlement of a first collective agreement by arbitration, the parties returned to the Board to have their differences adjudicated – The only outstanding issues for resolution were wage rates and the number of hours required to qualify for benefits coverage –The Board accepted the union's submissions that the Board's role was to effect an agreement that was "fair and reasonable" and would be "comparable to others in the same industry and geographic area," applying an objective standard – The employer, having terminated a contract with a predecessor cleaner company, attempted to introduce reduced wage rates and a higher threshold (minimum hours) of eligibility for benefits coverage – The Board specifically rejected the employer's argument that "ability to pay" should be a consideration – The Board found that the union's proposals reflected the terms of the collective agreement with the predecessor cleaner company when the contract was terminated – Those terms could hardly be described as "breakthrough" – Collective agreement ordered

KLEENWAY BUILDING MAINTENANCE SERVICES INC.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059 725

Fraud – Build-Up – Certification – Intervenor – Reconsideration – Termination – Unfair Labour Practice – The Amalgamated Transit Union, Local 113 ("the ATU") intervened on a request for reconsideration of a certificate granted to the United Food & Commercial Workers, Local 206 ("the UFCW") with respect to transit operators employed by Tok Transit Limited – Additionally, the ATU filed an application for termination of the UFCW's bargaining rights on the basis of fraud and an unfair labour practices complaint – The ATU sought additional remedies beyond the revocation of the UFCW's certificate and the voiding of its collective agreement: namely, a Board direction to Tok Transit to file a notice setting out an accurate estimate of the number of employees in the bargaining unit at the completion of the alleged build-up; a dismissal of the application for certification for not attaining at least 40 per cent support in the built-up unit; and, an order for an additional vote with the ATU added to the ballot – The Board first considered whether the ATU had standing to intervene – The ATU argued that they had a necessary interest on the basis that the members represented by the ATU are substantially more than those members who constituted the initial bargaining unit – The UFCW submitted that the mere fact that the ATU has members among Tok Transit employees is insufficient to give the ATU standing – The Board determined that the ATU was not raising the issue of build-up for the purpose of delaying the vote; rather it was contending that the UFCW and Tok Transit concealed the fact of the build-up and the true numbers of individuals in the bargaining unit – On that basis, the Board granted party status to the ATU – Prior to determining the request for reconsideration, the Board requested further submissions from the parties addressing the unusual remedies requested by the ATU – Matter continues.

TOK TRANSIT LIMITED; RE TOK TRANSIT LIMITED, THE REGIONAL MUNICIPALITY OF YORK AND BILL FISCH; RE UNITED FOOD & COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 113 747

Health and Safety – The employer sought suspension of an inspector's order that personal protective equipment be provided for employees of a sleep clinic, many of whose patients suffered from a contagious respiratory condition – The employer relied on documentation relating to cleaning and disinfection but did not explain how that protocol related to the employer's policies or procedures; further, the employer relied on a second document, a peer review assessment, that was four-and-a-half years old and made no mention of the current employer – The Ministry's submissions asserted that the employer had no screening procedures, no infection control measures, nor any personal protective equipment that would deal with potential exposure to the air-borne infection – The Board found that the health and safety of the workers might be endangered if the order were suspended, and the employer was unable to show that it would be prejudiced if the order were not suspended – Suspension request denied

ACCQCORP; RE JENNIFER MATTHIE, MARILYNNE MCDONALD AND MELANIE WEGLER, INSPECTORS 579

Interim Order – Jurisdictional Dispute – The Carpenters sought an interim order in the context of a jurisdictional dispute over the assignment of certain carpentry trim work in the high-rise residential sector that was being performed by the Labourers – The Labourers, in a collective bargaining relationship with Provincial Carpentry, had been doing the trim work for approximately nine months when they were told they were being removed from the project and replaced by members of the Carpenters with a bargaining relationship with Dole Contracting – After one day of an informational picket established by the Labourers in protest of the re-assignment, the work was returned to Provincial and the

Labourers – The Carpenters filed the jurisdictional dispute and sought to be placed on the project pending the outcome of the application – The Carpenters argued that the Labourers had engaged in illegal conduct by setting up the picket line and they should not be rewarded for these unlawful self-help efforts – The Labourers, for their part, denied any illegal conduct and argued that the Carpenters had not objected to the work assignment for nine months, and had not filed a grievance—in fact, could not do so—because they had no bargaining relationship with Provincial; it was only when the work was taken away from the Labourers and given to the Carpenters (and Dole) that the Carpenters were able to assert any rights over the work – The Board found that the Labourers, instead of waiting for the adjudication of its grievance or seeking a resolution to the jurisdictional dispute, intended to and did cause a work stoppage to protest the re-assignment of the work to the Carpenters: the conduct was improper and was not to be condoned – However, in the particular circumstances of this case, where it was not clear why Dole was awarded the work, and why it was being transferred to another contractor with a collective agreement with a different union, after nine months of uninterrupted (and unprotested) work by the Labourers working for Professional, and where a Carpenter win in the jurisdictional dispute would garner it a declaration only (the Board would not direct that the work be assigned to a particular contractor with a bargaining relationship with the Carpenters), the application for interim relief was dismissed

PROFESSIONAL CARPENTRY LTD.; RE THE CARPENTERS' DISTRICT COUNCIL OF ONTARIO; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL UNION, CARPENTERS AND ALLIED WORKERS, LOCAL 27,; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE ASPEN RIDGE HOMES LTD.; RE DOLE CONTRACTING INC. 739

Interim Relief – Certification – Practice and Procedure – Unfair Labour Practice – The Labourers sought interim reinstatement of K – As the employer conceded there was a serious issue to be tried and the circumstance occurred during an organizing campaign, the remaining issues were irreparable harm and balance of harm, and whether the termination of K was unrelated to the exercise of rights under the Act – Procedurally, the Board struck a reply declaration as it did not comply with Rule 19.3 (it was neither in response to a new issue which the applicant had no opportunity to address nor did it address issues the applicant could not have reasonably anticipated) – On the merits, the Board accepted the information in the ten declarations by the employer that no employee had asked about K's termination, nor had any employee indicated any understanding or belief that the end of K's employment with the Company was in any way connected to his support for the union organizing campaign – Additionally, the Board noted the timing of a number of events (including K's termination occurring 1 ½ months after the union represented to the employer and the Board that the campaign was dead) did not favour an inference that the employer knew K was a union organizer – The Board found nothing pleaded by the applicants that K's termination had caused irreparable harm or a "chilling effect" on the workplace – Accordingly, the interim application was dismissed

JAMES DICK CONSTRUCTION LIMITED, JAMES DICK HOLDINGS LIMITED, CALEDON SAND & GRAVEL INC., HAMILTON READY MIX LTD., ASSINCK LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506 708

Intervenor – Build-Up – Certification – Fraud – Reconsideration – Termination – Unfair Labour Practice – The Amalgamated Transit Union, Local 113 ("the ATU") intervened on a request for reconsideration of a certificate granted to the United Food & Commercial Workers, Local 206 ("the UFCW") with respect to transit operators employed by Tok Transit Limited – Additionally, the ATU filed an application for termination of the UFCW's bargaining rights on the basis of fraud and an unfair labour practices complaint – The ATU sought additional remedies beyond the revocation of the UFCW's certificate and the voiding of its collective agreement: namely, a Board direction to Tok Transit to file a notice setting out an accurate estimate of the number of employees in the bargaining unit at the completion of the alleged build-up; a dismissal of the application for certification for not attaining at least 40 per cent support in the built-up unit; and, an order for an additional vote with the ATU added to the ballot – The Board first considered whether the ATU had standing to intervene – The ATU argued that they had a necessary interest on the basis that the members represented by the ATU are substantially more than those members who constituted the initial bargaining unit – The UFCW submitted that the mere fact that the ATU has members among Tok Transit employees is insufficient to give the ATU standing – The Board determined that the ATU was not raising the issue of build-up for the purpose of delaying the vote; rather it was contending that the UFCW and Tok Transit concealed the fact of the build-up and the true numbers of individuals in the bargaining unit – On that basis, the Board granted party status to the ATU – Prior to determining the request for reconsideration, the Board requested further submissions from the parties addressing the unusual remedies requested by the ATU – Matter continues.

TOK TRANSIT LIMITED; RE TOK TRANSIT LIMITED, THE REGIONAL MUNICIPALITY OF YORK AND BILL FISCH; RE UNITED FOOD & COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 113 747

Judicial Review – Construction Industry Grievance – Timeliness – The Board had originally held that it had the discretion to accept a grievance referral under s. 133 of the Act, notwithstanding the language in the collective agreement that deemed a grievance filed beyond 14 days to be settled – On judicial review, applying a standard of reasonableness, the Divisional Court quashed the Board's determination: [2011] OLRB Rep September/October 629 – On appeal, the Court of Appeal upheld the Divisional Court ruling: the Board had to apply the terms of the collective agreement which deemed the grievance settled if it was not referred to arbitration within 14 days — The Court said the Board did not have the right to ignore the express terms of the collective agreement that addressed the grievance and arbitration procedures – Appeal dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE ONTARIO LABOUR RELATIONS BOARD 756

Jurisdictional Dispute – Conciliation – Bargaining Rights – Reference – Voluntary Recognition – The Minister of Labour asked the Board whether she has the authority to appoint a conciliation officer in this matter, involving a bargaining unit of employees who work at various Dilico Anishinabek Family Care ("Dilico") centres – The Union obtained bargaining rights from the Canada Industrial Relations Board ("CIRB") Dilico participated in the CIRB proceedings but always objected to CIRB jurisdiction over its labour relations – The Union issued notice to bargain a second renewal of the collective agreement, followed by a request to the Ontario Ministry of Labour for the appointment

of a Conciliation Officer, both of which were objected to by Dilico – Dilico argued that it had never voluntarily recognized the union, that the union was never certified by the Board, and that Dilico had only engaged in bargaining because the Union had previously obtained those rights from the CIRB – The Union argued that Dilico's voluntary recognition for the Union was a product of the first collective agreement and was confirmed by the execution of the second collective agreement – Assuming, without deciding, that the Board has jurisdiction over the labour relations of Dilico, the Board stated that the voluntary recognition provision provides an alternative route to the normal certification procedures and that the language of the statute contemplates intention – Dilico's lack of intention was manifest throughout and their participation in the CIRB proceedings should not be seen as voluntary – Additionally, the Union was never certified by the Board – Accordingly, the Union had no legal right to serve an enforceable notice to bargain, which is a prerequisite to the appointment of a conciliation office by the Minister – The question referred to the Board is answered in the negative

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA AND ITS LOCAL 7-0-1; RE DILICO ANISHINABEK FAMILY CARE 596

Jurisdictional Dispute – Construction industry Grievance Practice and Procedure – Reconsideration – The Labourers sought reconsideration of a Board decision deferring the adjudication of a grievance pending the outcome of a jurisdictional dispute, arguing that the grievance relating to the sub-contracted work was insufficient to trigger a jurisdictional dispute, or insufficient to allow the jurisdictional dispute to take primacy over the grievance referral and cause it to be deferred – The Board held that its longstanding jurisprudence clearly suggests that a multi-party dispute is much more efficiently and effectively addressed through the jurisdictional dispute process – The Labourers will not be deprived of their collective agreement argument when the underlying issue of the jurisdictional dispute is heard – Reconsideration denied; briefs ordered

DINEEN CONSTRUCTION LIMITED; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 46; RE MONALT ENVIRONMENTAL INC. 626

Jurisdictional Dispute – Interim Order – The Carpenters sought an interim order in the context of a jurisdictional dispute over the assignment of certain carpentry trim work in the high-rise residential sector that was being performed by the Labourers – The Labourers, in a collective bargaining relationship with Provincial Carpentry, had been doing the trim work for approximately nine months when they were told they were being removed from the project and replaced by members of the Carpenters with a bargaining relationship with Dole Contracting – After one day of an informational picket established by the Labourers in protest of the re-assignment, the work was returned to Provincial and the Labourers – The Carpenters filed the jurisdictional dispute and sought to be placed on the project pending the outcome of the application – The Carpenters argued that the Labourers had engaged in illegal conduct by setting up the picket line and they should not be rewarded for these unlawful self-help efforts – The Labourers, for their part, denied any illegal conduct and argued that the Carpenters had not objected to the work assignment for nine months, and had not filed a grievance—in fact, could not do so—because they had no bargaining relationship with Provincial; it was only when the work was taken away from the Labourers and given to the Carpenters (and Dole) that the Carpenters were able to assert any rights over the work – The Board found that the Labourers, instead of waiting for the adjudication of its grievance or seeking a resolution

to the jurisdictional dispute, intended to and did cause a work stoppage to protest the re-assignment of the work to the Carpenters: the conduct was improper and was not to be condoned – However, in the particular circumstances of this case, where it was not clear why Dole was awarded the work, and why it was being transferred to another contractor with a collective agreement with a different union, after nine months of uninterrupted (and unprotested) work by the Labourers working for Professional, and where a Carpenter win in the jurisdictional dispute would garner it a declaration only (the Board would not direct that the work be assigned to a particular contractor with a bargaining relationship with the Carpenters), the application for interim relief was dismissed

PROFESSIONAL CARPENTRY LTD.; RE THE CARPENTERS' DISTRICT COUNCIL OF ONTARIO; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL UNION, CARPENTERS AND ALLIED WORKERS, LOCAL 27,; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE ASPEN RIDGE HOMES LTD.; RE DOLE CONTRACTING INC. 739

Parties – Certification – Reconsideration – *State Immunity Act* – The Board previously granted DCMA's request to reconsider its decision certifying PSAC and directed a hearing to hear the evidence with respect to DCMA's claim for sovereign immunity under the *State Immunity Act* – The two issues were whether: 1) DCMA submitted (or attorned) to the jurisdiction of the OLRB as specifically contemplated by s. 4 of the *SIA*; and 2) the "commercial activity" exception to immunity applied, as specifically contemplated by s. 5 of the *SIA* – On the first issue the Board noted that an entity entitled to immunity that unknowingly takes a step in a proceeding can only escape having attorned to the authority of the court if the facts "could not reasonably have been ascertained" – The Board found the following occurred: PSAC served the certification application on the Commander, who was an individual who had authority to enter into agreements; the Commander consulted with DCMA's own counsel in Virginia; a Response was filed which raised substantive issues, explicitly acknowledged it was an agency of the US Department of Defence, it agreed to a vote and where it would be conducted, proposed individuals as scrutineers and filed schedules of employees; it participated in the vote and sought to add its counsel to the list of people being contacted; participated by teleconference in the counting of the ballots; and participated in further discussions – Only several days later, in post vote representations does the DCMA raise the issue of sovereign immunity – Given all this involvement by the DCMA, the Board was not prepared to accept that these actions were taken without the knowledge of the rights being waived – Having found that DCMA waived immunity, the Board went on to determine the "commercial activity" exception – The Board noted that the DCMA is "responsible in ensuring the integrity of contractual processes providing a broad range of contract procurement management services," and although it is weapons that are being purchased, the DCMA neither negotiates nor awards the contracts, but just monitors the implementation of the contracts – The Board was not convinced that sovereign activity was "insuring that you get what you bought, on time and for the negotiated price – which is what DCMA does" – The Board found that the connection was not too tenuous to create the requisite nexus for commercial activity to be brought into play, particularly when to hold otherwise would be to deprive Canadian workers, working on Canadian soil, the benefits of Canadian law; when American employees of DCMA are already represented in collective bargaining by a trade union and when the Commander in testimony acknowledged he could manage if the employees were engaged in collective bargaining – Accordingly the Board concluded that if DCMA has not waived its state immunity and attorned to the jurisdiction of the Board, then it is not immune pursuant to

s. 5 of the *SIA* because these proceedings related to a commercial activity – Interim Certificate issued

DEFENSE CONTRACT MANAGEMENT AGENCY – AMERICAS (CANADA); RE PUBLIC SERVICE ALLIANCE OF CANADA 603

Practice and Procedure – Certification – Interim Relief – Unfair Labour Practice – The Labourers sought interim reinstatement of K – As the employer conceded there was a serious issue to be tried and the circumstance occurred during an organizing campaign, the remaining issues were irreparable harm and balance of harm, and whether the termination of K was unrelated to the exercise of rights under the Act – Procedurally, the Board struck a reply declaration as it did not comply with Rule 19.3 (it was neither in response to a new issue which the applicant had no opportunity to address nor did it address issues the applicant could not have reasonably anticipated) – On the merits, the Board accepted the information in the ten declarations by the employer that no employee had asked about K's termination, nor had any employee indicated any understanding or belief that the end of K's employment with the Company was in any way connected to his support for the union organizing campaign – Additionally, the Board noted the timing of a number of events (including K's termination occurring 1 ½ months after the union represented to the employer and the Board that the campaign was dead) did not favour an inference that the employer knew K was a union organizer – The Board found nothing pleaded by the applicants that K's termination had caused irreparable harm or a "chilling effect" on the workplace – Accordingly, the interim application was dismissed

JAMES DICK CONSTRUCTION LIMITED, JAMES DICK HOLDINGS LIMITED, CALEDON SAND & GRAVEL INC., HAMILTON READY MIX LTD., ASSINCK LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506 708

Practice and Procedure – Construction industry Grievance – Jurisdictional Dispute – Reconsideration – The Labourers sought reconsideration of a Board decision deferring the adjudication of a grievance pending the outcome of a jurisdictional dispute, arguing that the grievance relating to the sub-contracted work was insufficient to trigger a jurisdictional dispute, or insufficient to allow the jurisdictional dispute to take primacy over the grievance referral and cause it to be deferred – The Board held that its longstanding jurisprudence clearly suggests that a multi-party dispute is much more efficiently and effectively addressed through the jurisdictional dispute process – The Labourers will not be deprived of their collective agreement argument when the underlying issue of the jurisdictional dispute is heard – Reconsideration denied; briefs ordered

DINEEN CONSTRUCTION LIMITED; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 46; RE MONALT ENVIRONMENTAL INC. 626

Practice and Procedure – Employment Standards – The employer sought leave of the Board to dispense with service of its application on several hundred employees, and permission to make payment of the substantial order in instalments beyond the 30-day limit for filing the appeal – In the circumstances of this case, the Board relieved the employer of the obligation to serve each employee individually, requiring the employer to post its application and the Board's decision in the workplace (subject to personal delivery to employees no longer part of the employer's workforce) – With respect to the payment of

the order into trust, the Board affirmed that historically it has not exercised its discretion to extend the time for filing until the full payment has been made – The Board stated, however, that if the employer paid the full amount of the order in accordance with its proposed schedule, it is likely that the Board will exercise its discretion to extend the time for filing to the date of the final payment – Matter proceeds

450477 ONTARIO LIMITED OPERATING AS CHARTRAND EQUIPMENT; RE JEAN-LOUISE ALBERT, ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS 577

Public Sector Labour Relations Transition Act – Bargaining Rights – Bargaining Unit – Previously the Board had determined that the creation of clinics in Sarnia and Chatham-Kent for ambulatory clients constituted a "health services integration" under *PSLRTA* and declared that PSLRTA applied – Nursing services to these ambulatory clients were previously provided on a home care basis by VON-Sarnia and VON-Chatham-Kent, for whom ONA held bargaining rights - Bayshore, a non-union employer, was the successful bidder to provide services to ambulatory clients through the clinics – The issue now before the Board under s. 22 of *PSLRTA* was the bargaining unit appropriate to Bayshore's operations after the health services integration having regard to the purposes of PSLRTA– Bayshore took the position that a bargaining unit restricted to the transferred service was appropriate, i.e. full-time RNs at the Clinics – ONA adopted the facts stated by Bayshore in response to a subsequent application for certification by another union, and argued that a bargaining unit of all RNs and all RPNs was appropriate to Bayshore's operations, given the high degree of integration of their work, terms and conditions of employment and supervision – The Board first noted that s. 22 does not confer bargaining rights upon a bargaining agent; rather section 23 requires a vote and where 40% or more of the bargaining unit were not represented by a bargaining agent, as was the instant case, "no union" had to be an option on the ballot – Whether or not ONA's bargaining rights with respect to the transferred services were preserved was incidental to the determination of what bargaining unit was appropriate for Bayshore's operations – Based on the facts stated by Bayshore in the other application, and not disavowed by Bayshore in this application, the Board found that a bargaining unit of all RNs and RPNs was appropriate to Bayshore's operations – Consideration of the four purposes of *PSLRTA* did not change this result, given the degree of integration of RNs and RPNs in Bayshore's operations: 1) a bargaining unit of all RNs and RPNs is more likely to "encourage best practices that ensure delivery of quality and effective public services that are affordable for taxpayers" 2) there were no other bargaining units to be rationalized and the bargaining unit consisting of RNs and RPNs would result in effective collective bargaining structures; 3) either bargaining unit will come into effect only if a majority of the employees in the bargaining unit vote that they wish to be represented by ONA, however, only the bargaining unit consisting of all RNs and all RPNs would facilitate collective bargaining and 4) although integrating RNs and RPNs may reduce workplace disputes in the future, permitting the expansion of bargaining rights, absent agreement of the parties may not – The Board found however that this last concern gave way to all the other factors and determined the bargaining unit appropriate for Bayshore encompasses all RNs and RPNs – Matter continues

BAYSHORE HOME HEALTH; RE ONTARIO NURSES' ASSOCIATION; RE BAYSHORE HOME HEALTH, SARNIA; RE BAYSHORE HOME HEALTH, CHATHAM; RE VICTORIAN ORDER OF NURSES SARNIA-LAMBTON; RE VICTORIAN ORDER OF NURSES CHATHAM-KENT; RE ERIE ST. CLAIR COMMUNITY CARE ACCESS CENTRE 584

Reconsideration – Build-Up – Certification – Fraud – Intervenor – Termination – Unfair Labour Practice – The Amalgamated Transit Union, Local 113 ("the ATU") intervened on a request for reconsideration of a certificate granted to the United Food & Commercial Workers, Local 206 ("the UFCW") with respect to transit operators employed by Tok Transit Limited – Additionally, the ATU filed an application for termination of the UFCW's bargaining rights on the basis of fraud and an unfair labour practices complaint – The ATU sought additional remedies beyond the revocation of the UFCW's certificate and the voiding of its collective agreement: namely, a Board direction to Tok Transit to file a notice setting out an accurate estimate of the number of employees in the bargaining unit at the completion of the alleged build-up; a dismissal of the application for certification for not attaining at least 40 per cent support in the built-up unit; and, an order for an additional vote with the ATU added to the ballot – The Board first considered whether the ATU had standing to intervene – The ATU argued that they had a necessary interest on the basis that the members represented by the ATU are substantially more than those members who constituted the initial bargaining unit – The UFCW submitted that the mere fact that the ATU has members among Tok Transit employees is insufficient to give the ATU standing – The Board determined that the ATU was not raising the issue of build-up for the purpose of delaying the vote; rather it was contending that the UFCW and Tok Transit concealed the fact of the build-up and the true numbers of individuals in the bargaining unit – On that basis, the Board granted party status to the ATU – Prior to determining the request for reconsideration, the Board requested further submissions from the parties addressing the unusual remedies requested by the ATU – Matter continues.

TOK TRANSIT LIMITED; RE TOK TRANSIT LIMITED, THE REGIONAL MUNICIPALITY OF YORK AND BILL FISCH; RE UNITED FOOD & COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 113 747

Reconsideration – Certification – Parties – *State Immunity Act* – The Board previously granted DCMA's request to reconsider its decision certifying PSAC and directed a hearing to hear the evidence with respect to DCMA's claim for sovereign immunity under the *State Immunity Act* – The two issues were whether: 1) DCMA submitted (or attorned) to the jurisdiction of the OLRB as specifically contemplated by s. 4 of the *SIA*; and 2) the "commercial activity" exception to immunity applied, as specifically contemplated by s. 5 of the *SIA* – On the first issue the Board noted that an entity entitled to immunity that unknowingly takes a step in a proceeding can only escape having attorned to the authority of the court if the facts "could not reasonably have been ascertained" – The Board found the following occurred: PSAC served the certification application on the Commander, who was an individual who had authority to enter into agreements; the Commander consulted with DCMA's own counsel in Virginia; a Response was filed which raised substantive issues, explicitly acknowledged it was an agency of the US Department of Defence, it agreed to a vote and where it would be conducted, proposed individuals as scrutineers and filed schedules of employees; it participated in the vote and sought to add its counsel to the list of people being contacted; participated by teleconference in the counting of the ballots; and participated in further discussions – Only several days later, in post vote representations does the DCMA raise the issue of sovereign immunity – Given all this involvement by the DCMA, the Board was not prepared to accept that these actions were taken without the knowledge of the rights being waived – Having found that DCMA waived immunity, the Board went on to determine the "commercial activity" exception – The Board noted that the DCMA is "responsible in ensuring the integrity of contractual processes providing a broad range of contract procurement management services," and although it is weapons that are being

purchased, the DCMA neither negotiates nor awards the contracts, but just monitors the implementation of the contracts – The Board was not convinced that sovereign activity was "insuring that you get what you bought, on time and for the negotiated price – which is what DCMA does" – The Board found that the connection was not too tenuous to create the requisite nexus for commercial activity to be brought into play, particularly when to hold otherwise would be to deprive Canadian workers, working on Canadian soil, the benefits of Canadian law; when American employees of DCMA are already represented in collective bargaining by a trade union and when the Commander in testimony acknowledged he could manage if the employees were engaged in collective bargaining – Accordingly the Board concluded that if DCMA has not waived its state immunity and attorned to the jurisdiction of the Board, then it is not immune pursuant to s. 5 of the *SIA* because these proceedings related to a commercial activity – Interim Certificate issued

DEFENSE CONTRACT MANAGEMENT AGENCY – AMERICAS (CANADA); RE PUBLIC SERVICE ALLIANCE OF CANADA 603

Reconsideration – Construction industry Grievance – Jurisdictional Dispute – Practice and Procedure – The Labourers sought reconsideration of a Board decision deferring the adjudication of a grievance pending the outcome of a jurisdictional dispute, arguing that the grievance relating to the sub-contracted work was insufficient to trigger a jurisdictional dispute, or insufficient to allow the jurisdictional dispute to take primacy over the grievance referral and cause it to be deferred – The Board held that its longstanding jurisprudence clearly suggests that a multi-party dispute is much more efficiently and effectively addressed through the jurisdictional dispute process – The Labourers will not be deprived of their collective agreement argument when the underlying issue of the jurisdictional dispute is heard – Reconsideration denied; briefs ordered

DINEEN CONSTRUCTION LIMITED; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 46; RE MONALT ENVIRONMENTAL INC. 626

Reference – Jurisdictional Dispute – Conciliation – Bargaining Rights – Voluntary Recognition – The Minister of Labour asked the Board whether she has the authority to appoint a conciliation officer in this matter, involving a bargaining unit of employees who work at various Dilico Anishinabek Family Care ("Dilico") centres – The Union obtained bargaining rights from the Canada Industrial Relations Board ("CIRB") – Dilico participated in the CIRB proceedings but always objected to CIRB jurisdiction over its labour relations – The Union issued notice to bargain a second renewal of the collective agreement, followed by a request to the Ontario Ministry of Labour for the appointment of a Conciliation Officer, both of which were objected to by Dilico – Dilico argued that it had never voluntarily recognized the union, that the union was never certified by the Board, and that Dilico had only engaged in bargaining because the Union had previously obtained those rights from the CIRB – The Union argued that Dilico's voluntary recognition for the Union was a product of the first collective agreement and was confirmed by the execution of the second collective agreement – Assuming, without deciding, that the Board has jurisdiction over the labour relations of Dilico, the Board stated that the voluntary recognition provision provides an alternative route to the normal certification procedures and that the language of the statute contemplates intention – Dilico's lack of intention was manifest throughout and their participation in the CIRB proceedings should not be seen as voluntary – Additionally, the Union was never

certified by the Board Accordingly, the Union had no legal right to serve an enforceable notice to bargain, which is a prerequisite to the appointment of a conciliation office by the Minister – The question referred to the Board is answered in the negative

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA AND ITS LOCAL 7-0-1; RE DILICO ANISHINABEK FAMILY CARE 596

Related Employer – Unfair Labour Practice – CUPE brought a related employer application and an unfair labour practice complaint arising out of the Hamilton Health Sciences Corporation's ("the Hospital") termination of its contractual arrangements for cleaning services with Sodexo MS Canada Limited ("Sodexo") The termination of the subcontract resulted in the layoff of Sodexo's cleaning staff who were represented by CUPE – The Union submitted that the responding parties (the Hospital and Sodexo) acted as a single employer or alternatively acted in concert to commit unfair labour practices by terminating the entire bargaining unit for making a lawful wage proposal – The Hospital and Sodexo argued that they ought not to be treated as one employer because they do not carry on associated or related activities or businesses and are not under common control or direction, and that the cancellation of the contract and the resulting layoffs were due to legitimate business decisions – The Board found that although there was cooperation and coordination between the respondents, this was not sufficient to conclude that they are under common control and direction – The Board found that there was no legitimate business rationale for the responding parties' conduct and concluded that this conduct--in particular the hasty timing of the contract cancellation in concert with earlier efforts to erode employee support for CUPE--constituted anti-union *animus* and were violations of the Act – The issue of remedial relief was remitted to the parties – Related employer application dismissed; unfair labour practices complaint allowed

HAMILTON HEALTH SCIENCES CORPORATION; RE CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 4800; RE SODEXO MS CANADA LIMITED 645

Remedies – Duty of Fair Representation – Among other complaints the applicant alleged that her union failed to advise employees as part of the ratification process that the employer had given notice during collective bargaining of its intention to revert to the strict language of the collective agreement with respect to an article in the collective agreement addressing entitlement to work at home – The article required employees to request prior approval, although the employer had been allowing employees, such as the complainant, to work from home for some time without seeking prior approval – The employer did advise the union that it intended to strictly enforce the work at home article, however during the course of two ratification procedures the union did not advise the employees of the notice given by the employer – The Board found that this was not a case of an inadvertent mistake having been made in the material circulated during the ratification process, but rather a case of a complete absence of communication regarding the elimination of a term or condition of employment during a critically important part of the collective bargaining process – The Board found the failure of the union to advise employees that the employer was going to eliminate a term and condition of employment that they had enjoyed for a number of years reflected a complete disregard for the critical consequences to employees and undermined the statutory purpose of requiring ratification votes, and accordingly the failure was arbitrary and a breach of s. 74 – Concerning remedy the Board found that the complainant lost the opportunity to discuss the matter with fellow employees, which may or may not have gotten the issue back to the bargaining table and may or may not have resulted in some change – The Board advised the parties that it saw this as a mere loss of opportunity which will only attract

nominal damages and remained seized to address damages if the parties could not agree on the quantum – Declaration made; Application granted in part

GAIL MYLES; RE ALLIANCE EMPLOYEES UNION (AEU); RE UNION OF NATIONAL EMPLOYEES 633

Right of Access – This is an application under section 13 of the *Labour Relations Act* for an access order in the context of an organization drive Many of the Respondent's employees reside at a camp owned by a third party – The Applicant was denied access to organize employees on the camp site – The Board can make an access order under section 13 of the Act in one of two situations: (1) the employee must either "reside on the property of the employer" or (2) "on property to which the employer has the right to control access" –The employer argued that the "right to control access" is tantamount to a right in ownership and that access to the camp is controlled by the third party who is the property owner – The Board found that access does not imply ownership and that the right to control access need not be exclusive to one party - The Board found that the Respondent controls access to the camp because the Respondent informs the third party who is, and who is not, to reside at the camp – The Board directed the Respondent to advise the third party that up to two representatives of the Applicant shall be admitted to the camp for the purpose of attempting to persuade the employees to join the Applicant – Right of access granted

LEDCOR CMI LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS); RE CONSTRUCTION WORKERS LOCAL 52 AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA 731

State Immunity Act – Certification – Parties – Reconsideration – The Board previously granted DCMA's request to reconsider its decision certifying PSAC and directed a hearing to hear the evidence with respect to DCMA's claim for sovereign immunity under the *State Immunity Act* – The two issues were whether: 1) DCMA submitted (or attorned) to the jurisdiction of the OLRB as specifically contemplated by s. 4 of the *SIA*; and 2) the "commercial activity" exception to immunity applied, as specifically contemplated by s. 5 of the *SIA* – On the first issue the Board noted that an entity entitled to immunity that unknowingly takes a step in a proceeding can only escape having attorned to the authority of the court if the facts "could not reasonably have been ascertained" – The Board found the following occurred: PSAC served the certification application on the Commander, who was an individual who had authority to enter into agreements; the Commander consulted with DCMA's own counsel in Virginia; a Response was filed which raised substantive issues, explicitly acknowledged it was an agency of the US Department of Defence, it agreed to a vote and where it would be conducted, proposed individuals as scrutineers and filed schedules of employees; it participated in the vote and sought to add its counsel to the list of people being contacted; participated by teleconference in the counting of the ballots; and participated in further discussions – Only several days later, in post vote representations does the DCMA raise the issue of sovereign immunity – Given all this involvement by the DCMA, the Board was not prepared to accept that these actions were taken without the knowledge of the rights being waived – Having found that DCMA waived immunity, the Board went on to determine the "commercial activity" exception – The Board noted that the DCMA is "responsible in ensuring the integrity of contractual processes providing a broad range of contract procurement management services," and although it is weapons that are being purchased, the DCMA neither negotiates nor awards the contracts, but just monitors the

implementation of the contracts – The Board was not convinced that sovereign activity was "insuring that you get what you bought, on time and for the negotiated price – which is what DCMA does" – The Board found that the connection was not too tenuous to create the requisite nexus for commercial activity to be brought into play, particularly when to hold otherwise would be to deprive Canadian workers, working on Canadian soil, the benefits of Canadian law; when American employees of DCMA are already represented in collective bargaining by a trade union and when the Commander in testimony acknowledged he could manage if the employees were engaged in collective bargaining – Accordingly the Board concluded that if DCMA has not waived its state immunity and attorned to the jurisdiction of the Board, then it is not immune pursuant to s. 5 of the *SIA* because these proceedings related to a commercial activity – Interim Certificate issued

DEFENSE CONTRACT MANAGEMENT AGENCY – AMERICAS (CANADA); RE PUBLIC SERVICE ALLIANCE OF CANADA 603

Termination – Build-Up – Certification – Fraud – Intervenor – Reconsideration – Unfair Labour Practice – The Amalgamated Transit Union, Local 113 ("the ATU") intervened on a request for reconsideration of a certificate granted to the United Food & Commercial Workers, Local 206 ("the UFCW") with respect to transit operators employed by Tok Transit Limited – Additionally, the ATU filed an application for termination of the UFCW's bargaining rights on the basis of fraud and an unfair labour practices complaint – The ATU sought additional remedies beyond the revocation of the UFCW's certificate and the voiding of its collective agreement: namely, a Board direction to Tok Transit to file a notice setting out an accurate estimate of the number of employees in the bargaining unit at the completion of the alleged build-up; a dismissal of the application for certification for not attaining at least 40 per cent support in the built-up unit; and, an order for an additional vote with the ATU added to the ballot – The Board first considered whether the ATU had standing to intervene – The ATU argued that they had a necessary interest on the basis that the members represented by the ATU are substantially more than those members who constituted the initial bargaining unit – The UFCW submitted that the mere fact that the ATU has members among Tok Transit employees is insufficient to give the ATU standing – The Board determined that the ATU was not raising the issue of build-up for the purpose of delaying the vote; rather it was contending that the UFCW and Tok Transit concealed the fact of the build-up and the true numbers of individuals in the bargaining unit – On that basis, the Board granted party status to the ATU – Prior to determining the request for reconsideration, the Board requested further submissions from the parties addressing the unusual remedies requested by the ATU – Matter continues.

TOK TRANSIT LIMITED; RE TOK TRANSIT LIMITED, THE REGIONAL MUNICIPALITY OF YORK AND BILL FISCH; RE UNITED FOOD & COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 113 747

Timeliness – Construction Industry Grievance – Judicial Review – The Board had originally held that it had the discretion to accept a grievance referral under s. 133 of the Act, notwithstanding the language in the collective agreement that deemed a grievance filed beyond 14 days to be settled – On judicial review, applying a standard of reasonableness, the Divisional Court quashed the Board's determination: [2011] OLRB Rep September/October 629 – On appeal, the Court of Appeal upheld the Divisional Court ruling: the Board had to apply the terms of the collective agreement which deemed the grievance settled if it was not referred to arbitration within 14 days — The Court said the

Board did not have the right to ignore the express terms of the collective agreement that addressed the grievance and arbitration procedures – Appeal dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE ONTARIO LABOUR RELATIONS BOARD..... 756

Unfair Labour Practice – Build-Up – Certification – Fraud – Intervenor – Reconsideration – Termination – The Amalgamated Transit Union, Local 113 ("the ATU") intervened on a request for reconsideration of a certificate granted to the United Food & Commercial Workers, Local 206 ("the UFCW") with respect to transit operators employed by Tok Transit Limited – Additionally, the ATU filed an application for termination of the UFCW's bargaining rights on the basis of fraud and an unfair labour practices complaint – The ATU sought additional remedies beyond the revocation of the UFCW's certificate and the voiding of its collective agreement: namely, a Board direction to Tok Transit to file a notice setting out an accurate estimate of the number of employees in the bargaining unit at the completion of the alleged build-up; a dismissal of the application for certification for not attaining at least 40 per cent support in the built-up unit; and, an order for an additional vote with the ATU added to the ballot – The Board first considered whether the ATU had standing to intervene – The ATU argued that they had a necessary interest on the basis that the members represented by the ATU are substantially more than those members who constituted the initial bargaining unit – The UFCW submitted that the mere fact that the ATU has members among Tok Transit employees is insufficient to give the ATU standing – The Board determined that the ATU was not raising the issue of build-up for the purpose of delaying the vote; rather it was contending that the UFCW and Tok Transit concealed the fact of the build-up and the true numbers of individuals in the bargaining unit – On that basis, the Board granted party status to the ATU – Prior to determining the request for reconsideration, the Board requested further submissions from the parties addressing the unusual remedies requested by the ATU – Matter continues.

TOK TRANSIT LIMITED; RE TOK TRANSIT LIMITED, THE REGIONAL MUNICIPALITY OF YORK AND BILL FISCH; RE UNITED FOOD & COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 113..... 747

Unfair Labour Practice – Certification Interim Relief – Practice and Procedure – The Labourers sought interim reinstatement of K – As the employer conceded there was a serious issue to be tried and the circumstance occurred during an organizing campaign, the remaining issues were irreparable harm and balance of harm, and whether the termination of K was unrelated to the exercise of rights under the Act – Procedurally, the Board struck a reply declaration as it did not comply with Rule 19.3 (it was neither in response to a new issue which the applicant had no opportunity to address nor did it address issues the applicant could not have reasonably anticipated) – On the merits, the Board accepted the information in the ten declarations by the employer that no employee had asked about K's termination, nor had any employee indicated any understanding or belief that the end of K's employment with the Company was in any way connected to his support for the union organizing campaign – Additionally, the Board noted the timing of a number of events (including K's termination occurring 1 ½ months after the union represented to the employer and the Board that the campaign was dead) did not favour an inference that the employer knew K was a union organizer – The Board found nothing

pleaded by the applicants that K's termination had caused irreparable harm or a "chilling effect" on the workplace – Accordingly, the interim application was dismissed

JAMES DICK CONSTRUCTION LIMITED, JAMES DICK HOLDINGS LIMITED, CALEDON SAND & GRAVEL INC., HAMILTON READY MIX LTD., ASSINCK LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506 708

Unfair Labour Practice – Related Employer – CUPE brought a related employer application and an unfair labour practice complaint arising out of the Hamilton Health Sciences Corporation's ("the Hospital") termination of its contractual arrangements for cleaning services with Sodexo MS Canada Limited ("Sodexo") The termination of the subcontract resulted in the layoff of Sodexo's cleaning staff who were represented by CUPE – The Union submitted that the responding parties (the Hospital and Sodexo) acted as a single employer or alternatively acted in concert to commit unfair labour practices by terminating the entire bargaining unit for making a lawful wage proposal – The Hospital and Sodexo argued that they ought not to be treated as one employer because they do not carry on associated or related activities or businesses and are not under common control or direction, and that the cancellation of the contract and the resulting layoffs were due to legitimate business decisions – The Board found that although there was cooperation and coordination between the respondents, this was not sufficient to conclude that they are under common control and direction – The Board found that there was no legitimate business rationale for the responding parties' conduct and concluded that this conduct--in particular the hasty timing of the contract cancellation in concert with earlier efforts to erode employee support for CUPE--constituted anti-union *animus* and were violations of the Act – The issue of remedial relief was remitted to the parties – Related employer application dismissed; unfair labour practices complaint allowed

HAMILTON HEALTH SCIENCES CORPORATION; RE CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 4800; RE SODEXO MS CANADA LIMITED 645

Voluntary Recognition – Jurisdictional Dispute – Conciliation – Bargaining Rights – Reference – The Minister of Labour asked the Board whether she has the authority to appoint a conciliation officer in this matter, involving a bargaining unit of employees who work at various Dilico Anishinabek Family Care ("Dilico") centres – The Union obtained bargaining rights from the Canada Industrial Relations Board ("CIRB") – Dilico participated in the CIRB proceedings but always objected to CIRB jurisdiction over its labour relations – The Union issued notice to bargain a second renewal of the collective agreement, followed by a request to the Ontario Ministry of Labour for the appointment of a Conciliation Officer, both of which were objected to by Dilico – Dilico argued that it had never voluntarily recognized the union, that the union was never certified by the Board, and that Dilico had only engaged in bargaining because the Union had previously obtained those rights from the CIRB – The Union argued that Dilico's voluntary recognition for the Union was a product of the first collective agreement and was confirmed by the execution of the second collective agreement – Assuming, without deciding, that the Board has jurisdiction over the labour relations of Dilico, the Board stated that the voluntary recognition provision provides an alternative route to the normal certification procedures and that the language of the statute contemplates intention – Dilico's lack of intention was manifest throughout and their participation in the CIRB proceedings should not be seen as voluntary – Additionally, the Union was never certified by the Board – Accordingly, the Union had no legal right to serve an

enforceable notice to bargain, which is a prerequisite to the appointment of a conciliation office by the Minister – The question referred to the Board is answered in the negative

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA AND ITS LOCAL 7-0-1; RE DILICO ANISHINABEK FAMILY CARE 596

2541-11-ES; 2929-11-ES: 1180240 Ontario Inc. o/a Joey's Only Seafood, Applicant v. Penny Wilks, Willow Walker, Aline Heimbuch, Alicja Dworzak, Lia Carriere, Allisha Peever, Samantha Quilty, Denra Slipp, Alissa Crossley, Roselle Noordyk, Tracie Boone, Kendra Dearlove, Deanna Winn and Director of Employment Standards, Responding Parties; 1180240 Ontario Inc. o/a Joey's Only Seafood, Applicant v. Penny Wilks, Willow Walker, Aline Heimbuch, Alicja Dworzak, Lia Carriere, Alissa Crossley, Roselle Noordyk, Tracie Boone and Director of Employment Standards, Responding Parties.

Employment Standards – The employer appealed an Employment Standards Officer's Compliance Orders for public holiday pay and an order to pay employees at the prescribed minimum wage – The issue was whether servers who served alcohol infrequently at a licensed restaurant should be paid the standard minimum wage of $10.25 or the liquor server minimum wage of $8.90 per hour set out in s. 5(1) of Ontario Regulation 285/01 – The lower wage rate applies to an employee who serves liquor "as a *regular* part of his or her employment" – The Director of Employment Standards (DES) argued that an interpretation of the word *regular* should include the context of the employer's business: if the sale of liquor is an insignificant part of the business, then the liquor server minimum wage should not apply – The employer countered that the liquor service is a regular part of the servers' employment as the restaurant is licensed and its employees are required to serve alcohol upon request – The Board rejected DES' argument and determined that the volume of liquor sales is irrelevant – The central question for the Board was whether the serving of alcohol was a regular part of the servers' employment – The evidence was that alcohol sales, though low, occurred almost every day – The application was allowed and the Compliance Orders rescinded – The Board ordered DES to return the money paid into trust, including the administrative fee, to the Employer

BEFORE: *Kelly Waddingham*, Vice-Chair.

APPEARANCES: *Susan Olthof* and *Dave Ruelofsen* appearing for the applicant, *Lia Carriere* and *Denra Slipp* appearing on behalf of themselves; *Natasha Wilson* appearing for the Director of Employment Standards.

DECISION OF THE BOARD: July 11, 2012

1. This is an employer's appeal of an Employment Standards Officer's Compliance Order No. 66672 in the amount of $4,447.12 for public holiday pay and wages inclusive of administration fees and Compliance Order No. 55666 which required the employer to pay employees at the prescribed minimum wage.

2. The issue in this case is whether servers working for Joey's Only Seafood ("the employer" or "the restaurant") should be paid the minimum wage of $10.25 in accordance with section 23(1) of the Act; or are paid the liquor server minimum wage of $8.90 per hour set out in Ontario Regulation 285/01 s.5(1) to the Act.

FACTS

3. The employer is a seafood and family restaurant located in the city of Simcoe. The restaurant has 18 tables and has been in business for 16 years. The restaurant is open for lunch and dinner.

4. Ms. Susan Olthof bought the restaurant in 2006. In 2007 the restaurant applied for and was granted a liquor license. The city of Simcoe zoning bylaws allow the restaurant to sell beer and wine not hard liquor.

5. The duties of servers include serving food, alcohol, merchandise, cash, cleaning and customer relations. The liquor license requires that all staff take the Smart Service course before they will be allowed to serve alcohol. Servers are paid $8.90 per hour, the kitchen staff is paid the general minimum wage of $10.25 per hour.

6. Ms. Carriere has worked as a server at the restaurant for the past two years. She works both the lunch and evening shift. She testified that she sells approximately $35.00 per day mostly during the evening hours.

7. Waiter Ms. Denra Slip testified that she works as a server during the dinner shift. Ms. Denra testified that she serves 1 to 15 glasses of beer and or wine. Sales tend to increase during the weekends.

8. Patrons of the restaurant do not frequent the restaurant for the sole purpose of purchasing alcohol. Both servers testified that there are some day(s) in a month that they do not sell any alcohol.

9. Ms. Olthof provided a daily tally of the restaurants sales by category of merchandise, food, liquor, and desserts for the period between October 2010 and October 2011. According to this document alcohol is served every day of the month with few exceptions. DES provided the following chart which summarized the total amount of alcohol sold as a percentage of the restaurant's monthly gross sales for the relevant period of employment.

Table of Alcohol Sold as a Percentage of Gross Sales

Month	Sale of Alcohol as a Percentage of Gross Sales
October 2010	2%
November 2010	2%
December 2010	1.4%
January 2011	1.8%
February 2011	1.3%
March 2011	2.1%
April 2011	2.0%

May 2011	2.1%
June 2011	1.4%
July 2011	1.8%
August 2011	1.6%
September 2011	1.8%
October 2011	2%

10. The servers testified that they rely on their tips as part of their salary. Ms. Denra testified that she makes approximately $17.00 to $20.00 per hour including tips. Servers pay out two percent of their tips to the kitchen staff.

ARGUMENTS

11. The Director of Employment Standards (DES) relies on Bruce G. Cole v. Judith Sisson and the Ministry of Labour [2002] O.E.S.A.D. No. 53 a case in which the Board considered whether servers who served beer once or twice a month in a restaurant were entitled to the general minimum wage as opposed to the lower minimum wage for liquor servers. The Board interpreted the word *regular* in the regulation to mean that the serving of alcohol must be "routine" or have an element of "predictability." The Board also considered the quantity of liquor and number of customers served to be relevant factors. The Board determined that the servers were entitled to the general minimum wage as they served alcohol on a "sporadic or irregular" basis.

12. DES argues that the plain reading of the word *regular* means that the exemption does not apply to employees who occasionally serve liquor. DES referred to the servers' testimony that most alcohol is served during dinner and that there are shifts and or days when they do not serve any alcohol.

13. The DES argues that a determination of the appropriate wage rate should include an interpretation of the word *regular* in the context of the employer's business. If the sale of liquor is an insignificant part of a restaurant's business then the liquor server minimum wage rate should not apply to its servers. DES argued that the total sales from alcohol for the restaurant were never more than 2% of the restaurant's gross total sales and therefore the employer is not entitled to pay its servers the lower liquor server minimum wage.

14. The employer argues that liquor service is a regular part of the server's employment because it is licensed for the service of alcohol and because its employees are required to serve alcohol upon request.

ANALYSIS

15. The general provisions of the Act require the payment of the standard minimum wage to employees. But when an employee serves alcohol as a regular part of his or her employment the employer is permitted to pay the employee a lower liquor server's rate.

16. Section 5(1.2) of the Ontario Regulation 285/01 to the Act provides:

> For an employee who, as a regular part of his or her employment, serves liquor directly to customers, guests, members or patrons in premises for which a licence or permit has been issued under the *Liquor Licence Act*, $8.25 an hour.

17. The assumption underlying the regulation is that servers who work in restaurants with a liquor license earn gratuities as part of their remuneration. Restaurants with liquor licenses usually provide seating and more expensive entrée selections which along with the sale of alcohol increase the total customer bill which is reflected in the gratuities which servers receive. Both servers testified that they earn and rely upon gratuities as part of their hourly wage. Ms. Denra testified that she makes approximately $17.00 to $20.00 per hour including gratuities.

18. However, as the Board stated in Cole, *supra*, the mere possession of a liquor license and availability of liquor for sale does not entitle an employer to pay the liquor server wage to its servers.

19. The central question is whether an employee serves alcohol as a *regular* part of their duties. Clearly kitchen staff, bussers, and restaurant hosts do not serve alcohol and therefore are entitled to standard minimum wage.

20. The Concise Oxford Dictionary defines the word *regular* as "usual, standard, customary conforming to a rule or principle; systemic; habitual."

21. The definition of the word *regular* encompasses the frequency with which an event occurs. The evidence indicates that alcohol is sold on a daily basis. The servers in *Cole, supra* served only one to two beers per month and therefore the Board found that the serving of alcohol was not a regular part of their duties.

22. I reject DES's argument that the determination of the appropriate wage rate should include an interpretation of *"regular"* in the context of the employer's business that is if the volume of liquor sales is an insignificant part of an employer's business then they would not be entitled to pay their servers the liquor server wage rate. The regulation provides that the serving of alcohol *is a regular* ***part of*** a server's duties. The sale of alcohol need be only a part of a server's regular duties. As such, the sales volume of alcohol as a percentage of total sales is not relevant. What is relevant is the frequency or periodic nature of those sales of alcohol by the server. In the present case the volume of alcohol sales as a proportion of the restaurant's total sales is relatively low, however the evidence indicates that alcohol was served almost every day and often several times a day.

23. I am satisfied based on the evidence that the servers at this restaurant sell and serve alcohol regularly alcohol as part of their duties. For all the aforementioned reasons the application is allowed. Compliance Orders Nos. 66672 and 55666 are rescinded. The DES is directed to return to the employer all the money paid into trust including the administrative fee.

1158-12-ES 450477 Ontario Limited operating as Chartrand Equipment, Applicant v. Jean-Louise Albert, et al, Responding Parties.

Employment Standards – Practice and Procedure – The employer sought leave of the Board to dispense with service of its application on several hundred employees, and permission to make payment of the substantial order in instalments beyond the 30-day limit for filing the appeal – In the circumstances of this case, the Board relieved the employer of the obligation to serve each employee individually, requiring the employer to post its application and the Board's decision in the workplace (subject to personal delivery to employees no longer part of the employer's workforce) – With respect to the payment of the order into trust, the Board affirmed that historically it has not exercised its discretion to extend the time for filing until the full payment has been made – The Board stated, however, that if the employer paid the full amount of the order in accordance with its proposed schedule, it is likely that the Board will exercise its discretion to extend the time for filing to the date of the final payment – Matter proceeds

BEFORE: *Ian Anderson*, Vice-Chair.

DECISION OF THE BOARD: July 17, 2012

1. This is an employer application for review under section 116 of the *Employment Standards Act, 2000.*

2. The application was filed with the Board on July 11, 2012. It makes reference to a letter to the Board dated July 5, 2012 from counsel for the employer which states the following:

> We act for Chartrand Equipment in the above-noted matter.
>
> We are writing in advance of filing an Application for Review (*Employment Standards Act, 2000*) to receive direction from the Board regarding several procedural and logistical matters pertaining to the Application.
>
> Chartrand Equipment was served with the attached Order to Pay Wages on June 11, 2012. The total amount owing in the Order to Pay is over four hundred thousand dollars ($400,000.00).
>
> The majority of the Order to Pay amount pertains to the Ministry of Labour's finding that certain employees were not paid overtime in accordance with thresholds set out in the *Employment Standards Act, 2000.* In response to this claim, Chartrand Equipment submits that the affected employees either occupied managerial roles within the organization, and therefore, were not entitled to overtime, or were subject to a different threshold for overtime pay as a result of the fact that they performed work at the site of road building. As a result, for the majority of employees, it is effectively an "all or nothing" argument; either all affected employees are entitled to overtime or none of them are.
>
> A smaller amount of the claim pertains to whether Chartrand Equipment should pay vacation pay on an allowance provided to employees. Again, this

amount is an "all or nothing" amount; either all affected employees are entitled to the payment or none of them are.

As a result, Chartrand Equipment submits that including the over five hundred (500) named employees in the Application for Review would unduly complicate and extend the matter. Consequently, Chartrand Equipment hereby requests consent of the Board to not be required to individually serve each employee with the Application for Review and instead, be permitted to post the Application for Review in the workplace such that it should come to the attention of potentially affected individuals. If the Board is unwilling to grant this request, we further request that the Board extend the time for serving and filing the Application for Review to August 1, 2012 to permit Chartrand Equipment to process and deliver the individual notices.

Additionally, at this point in time, Chartrand Equipment does not have the financial resources to pay the entire amount of the order to the Director of Employment Standards. However, it can ensure that the resources are made available prior to September 15, 2012. As a result, Chartrand Equipment hereby requests an extension to pay the amount of the order to the Director of Employment Standards based on the following payment structure:

- On or before July 11, 2012 – One hundred thousand dollars ($100,000.00);
- On or before August 1, 2012 – One hundred thousand dollars ($100,000.00);
- On or before August 22, 2012 – One hundred thousand dollars ($100,000.00); and
- On or before September 12, 2012 – One hundred six thousand eight hundred eighty three dollars and three cents ($106,883.03).

Should you have any questions regarding the foregoing, please contact the undersigned.

3. Unfortunately, the July 5, 2012 letter was not brought to a panel of the Board in a timely manner. In the result, on its filed application Chartrand Equipment has certified that copies of its application have been delivered to each of the responding employees, and to the Director of Employment Standards.

4. The number of individual responding employees and the amount of the order to pay subject to review are both significantly greater than in a typical application for review. Having regard to this and to the letter the Board makes the following directions.

5. Chartrand Equipment is relieved of the requirement to deliver a copy of its application (to the extent that its efforts to do so prove unsuccessful) or any other documents filed in relation to this application to each of the employees named in the order to pay (the "named employees"), except as provided later in this decision. Chartrand Equipment shall instead post copies of its application and of this decision at locations where they are most likely to come to the attention of the named employees. Similarly, Chartrand Equipment is to post copies of any other documents which it files with the Board or

any notices or decisions which it receives from the Board in relation to its application. Chartrand Equipment shall certify to the Board and to the Director of Employment Standards the dates on which this is done and the places where the postings have taken place. The documents are to remain posted until any date set by the Board for the hearing of this matter.

6. Upon request by any of the named employees, Chartrand Equipment is to provide, at its expense, a copy of any of the documents posted in accordance with the preceding paragraph to the requesting employee(s).

7. Notwithstanding anything else in this decision, Chartrand Equipment is not relieved of its obligation to comply with the Board's Rules of Procedure in relation to any individual (a) who was a named employee but who is no longer employed by Chartrand Equipment or (b) who was a named employee but prior to the conclusion of the proceedings ceases to be employed by Chartrand Equipment, with respect to any document filed after that individual ceased to be employed by Chartrand Equipment.

8. An application for review of an order to pay wages made under section 103 is not complete until such time as the amount owing under the order is paid to the Director of Employment Standards in trust: see section 116(1)(b). The failure to pay the full amount required into trust within 30 days of the date on which the order to pay was received by the employer renders the application untimely. Section 116(5), however, gives the Board the discretion to extend the time for filing an application for review. The Board has consistently declined to consider the exercise its discretion until such time as an application is complete. Having said that, if Chartrand Equipment makes the payments in accordance with the schedule which is set out in counsel's letter of July 5, 2012 it appears to me that the Board would exercise its discretion to extend the time for filing this application.

9. I am seized of this application for the purposes of case management.

0872-12-HS; 0873-12-HS Accqcorp, Applicant v. Jennifer Matthie, Marilynne McDonald, Inspector and Melanie Wegler, Inspector, Responding Parties.

Health and Safety – The employer sought suspension of an inspector's order that personal protective equipment be provided for employees of a sleep clinic, many of whose patients suffered from a contagious respiratory condition – The employer relied on documentation relating to cleaning and disinfection but did not explain how that protocol related to the employer's policies or procedures; further, the employer relied on a second document, a peer review assessment, that was four-and-a-half years old and made no mention of the current employer – The Ministry's submissions asserted that the employer had no screening procedures, no infection control measures, nor any personal protective equipment that would deal with potential exposure to the air-borne infection – The Board found that the health and safety of the workers might be endangered if the order were suspended, and the employer was unable to show that it would be prejudiced if the order were not suspended – Suspension request denied

BEFORE: *Gail Misra*, Vice-Chair.

DECISION OF THE BOARD: July 6, 2012

1. Board File No. 0873-12-HS is an application under section 61(7) of the *Occupational Health and Safety Act,* R.S.O. 1990, c. O.1, as amended (the "Act") seeking the suspension of Order No. 1 issued by Inspector Marilynne McDonald in Field Visit No. 03172FJVN388 on May 15, 2012. The applicant has also filed an appeal of Order No. 1 which has been assigned Board File No. 0872-12-HS. This decision deals only with the suspension request.

2. The Ministry of Labour and the Inspectors oppose the request for suspension. The submissions filed in support of their position (the "Ministry's submissions") review the relevant principles, which are well established.

3. In dealing with a request to suspend an order, the Board's approach is set out succinctly in *The Regional Municipality of Hamilton-Wentworth*, [1998] OLRB Rep. Aug. 709:

> Three factors have generally been considered by the Board when determining whether a suspension of an order is appropriate in the circumstances:
>
> a) whether the suspension of the order (or, alternatively, the failure to suspend the order) would endanger worker safety;
>
> b) the prejudice to the parties if the order is or is not suspended; and
>
> c) whether there is a strong *prima facie* case for a successful appeal of the order.

It is fair to say that the onus lies upon the party desiring the suspension order to establish that such an order ought to issue. Furthermore, the decision of Adjudicator Herman in *General Motors of Canada Limited*, [1997] O.O.H.S.A.D. No. 62, stands for the proposition that a certain degree of deference must be afforded to decisions made by inspectors for the purpose of considering the suspension of these orders pending their appeal. In the absence of some persuasive reason to interfere with that order pending the hearing of the appeal on the merits, the original order should not be suspended.

4. This degree of deference is enhanced when workplace safety is in issue. I refer to the comments of the Board in *R.J. Dungey & Sons Ltd.*, [1999] OLRB Rep. Jan./Feb. 82 at para. 19:

> 19. Furthermore, although the inspector's order is under appeal there is, in my opinion, a rebuttable presumption that an inspector's order is authorized by the OHSA and is correct. An inspector has the statutory duty to administer and enforce the OHSA. An inspector's decision and order are part of that statutory administration and enforcement framework and as such should not be suspended prior to a hearing on the merits of the appeal unless an appellant demonstrates compelling grounds for the Board to do so. Adjudicator Robert Herman noted in *General Motors of Canada Ltd., supra,* "... it is appropriate that deference be given to an Inspector's decision on an application for suspension of his or her order. In the absence of some persuasive reason to interfere with that order pending the full application for review, it ought not to be suspended." The burden of persuasiveness becomes greater, in my view, as the risk to the safety of workers increases with the suspension of the order.

5. The applicant operates a sleep laboratory in Waterloo, Ontario. The Inspector attended at the workplace in response to a complaint made by a worker from the sleep laboratory with respect to having to work with patients who were resistant to antibiotics and may have a contagious form of Methicillin-Resistant Staphylococcus Aureus ("MRSA"). The concern expressed by the worker was that there was inadequate personal protective equipment available for use in the sleep laboratory, that the practices and procedures for infection control were inadequate, and that employees had received inadequate training to address MRSA-related issues.

6. In the course of her inspection of the sleep laboratory the Inspector made the following order which is the subject of the appeal and this application for suspension on an interim basis:

> The Employer shall take every precaution reasonable in the circumstances for the protection of a worker by ensuring that workers have measures and procedures for the wearing of Personal Protective Equipment (PPE) to prevent exposure to Methicillin Resistant Staph Aureus (MRSA). At the time of this inspection, the Employer did not have written measures and procedures for workers for the wearing of PPE to prevent exposure to MRSA.

7. The applicant was required to comply with the Order or Requirement by June 15, 2012.

8. The relevant provision of the Act cited by the Inspector is section 25(2)(h) which states:

> 25. (2) Without limiting the strict duty imposed by subsection (1), an employer shall,
>
> > take every precaution reasonable in the circumstances for the protection of a worker;

9. The relevant portions of the Ministry's submissions read as follows:

> ...
>
> 3. Methicillin Resistant Staph Aureus ("MSRA") [sic] is an infection that can be transferred to workers by respiratory means or by skin contact from a carrier, It is a danger to workers who work with members of the public who may carry the infection.
>
> 4. The Appellant ("ACCQcorp") runs a sleep clinic in which their workers are exposed to potential carriers of this infection who arrive, or who are at, the clinic for treatment.
>
> 5. It is the Ministry's position that ACCQcorp does not dispute the existence of this hazard to its workers. Please note that they do not take the position in the suspension that this danger does not exist for their workers, but rather that they have sufficiently addressed the issue. As well, their own submitted document "Appendix E: MSRA [sic] Cleaning and Disinfection Protocol' ("Appendix E") (page 11) outlines these dangers in the first section of the document. In particular, the section marked "Health Hazard" notes both the pathognicity and epidemiology of this infection.

Has ACCQcorp addressed the danger?

6. On the Ministry's visit to this workplace on May 15, 2012, the Ministry found that ACCQcorp had nothing in place to deal with potential exposure of its workers to MSRA [sic]. In this regard they did not have:

a) Screening procedures;
b) Infection control measures and procedures;
c) Any personal protective equipment ("PPE") in the workplace to deal with an MSRA [sic] situation. Such PPE would normally include equipment such as: respirators, gloves, gowns, masks, etc....

7. The Appendix E document provided by, and relied upon, by ACCQcorp as fulfillment of the order, is not a written measure and procedure on the wearing of PPE to prevent exposure to MSRA [sic], as required by the order. The document deals with procedures for cleaning and disinfecting to respond to MSRA [sic]. There is nothing in the document dealing with issues specific to PPE as it should be used in this workplace, such as: What PPE is required to be used by these specific workers and in what situations? How and where will that PPE be made available to the workers? What they should they do, or who should they speak to, if the PPE is not available?

8. In addition[sic], their document does not outline when is a worker is required to change their PPE when caring for a patient with MRSA. For example, workers may be of the understanding that they can leave the PPE on to care for other patients when it needs to be taken off to care for other patients and a new set of PPE put on when returning to care for the patient with MRSA. There is a sequence to follow to put on a gown, mask and gloves and a separate sequence to take off the gown mask and gloves. If not followed, the worker can expose themselves to MRSA.

9. The clinic has also not dealt with hand hygiene, which is a huge part of infection prevention and control. When to wash the hands, how long to wash and whether to use soap and water or waterless hand sanitizer are important considerations. There is also a washing protocol for washing the hands with soap & water and a separate one to wash the hands with waterless hand sanitizer.

10. The Appendix E document, at best, has only limited value for workers who may need to clean and disinfect blood or body fluid spills. It is no assistance for workers who are not involved in "cleaning" but may be exposed to MSRA [sic] by contact with patients of the clinic. It does not address the procedures that should be followed in terms of PPE and patient contact or screening for the infection.

11. The Appendix E document was shown to the Ministry at the time of the inspection and ACCQcorp was informed at that time that the document did not meet the intention of the order. The intent of the order was for ACCQcorp to create a document that would deal with the specific step by step procedures it would establish in its workplace to deal with issues of worker exposure to MRSA.

...

10. Accqcorp takes the position that it has adequate policies and safety procedures in place; that those policies and safety procedures are followed; that it has provided training to its employees; and, that its policies and procedures have been approved by the Ministry of Health on a regular basis. It claims that the order is in substance erroneous and is based on incorrect and false information provided by the complaining worker.

11. The applicant provided a document entitled "Appendix E – MRSA Cleaning & Disinfection Protocol" as an attachment to its suspension request. This document was apparently reviewed by the Inspector on her visit. It is unclear to the Board where that document comes from or how it relates to Accqcorp's policies and procedures, and as such is of no assistance to the Board in its consideration of this suspension request. It may be that on the hearing of the appeal application the applicant will be able to provide evidence to prove the document and demonstrate how it relates to Accqcorp's policies and procedures.

12. The second document provided by the applicant is a copy of a letter dated October 31, 2007 from the Ministry of Health and Long Term Care, Health System Accountability and Performance Division, to Mednik Sleep Studies & Research Centre Inc. regarding the "K-W Sleep Lab" The letter states that a peer review assessment had been conducted by the College of Physicians and Surgeons of Ontario and a copy of the findings dated September 25, 2007 had been provided to the Ministry. There are two problems with the Board's consideration of this document: the first is that the applicant has failed to make clear how this relates to Accqcorp, as that is not an entity mentioned anywhere in the letter; secondly and in any event, the letter dates from October 31, 2007 and relates to a peer review and assessment that was conducted four and a half years ago. As such, and on a review of submissions to determine whether an Inspector's Order should be suspended pending appeal, this document is of little assistance to the Board.

13. The Ministry's submissions argue that MRSA is a contagious infection which can be transferred by respiratory means or by skin contact from a carrier. It states that workers at the sleep laboratory are exposed to potential carriers of the infection who arrive or are at the laboratory for treatment. The Ministry submissions note that Accqcorp does not dispute the existence of this hazard to its workers, but rather that the applicant takes the position that that it has adequately addressed the issue through its' existing policies and procedures.

14. The Ministry submissions have outlined the areas in which Accqcorp does not have policies and procedures to deal with potential exposure of workers, and there is nothing in the application for suspension of the Order that assists the Board in making an assessment of the merits of these assertions.

15. Thus, on its face it would appear that suspension of the Order could endanger worker safety. The applicant has not stated what, if any, prejudice it would suffer if the order is not suspended. It is not possible at this juncture based on the applicant's submissions to ascertain if there is or is not a strong *prima facie* case for a successful appeal of the order. Therefore, in all the circumstances the Board finds that it is appropriate to defer to the assessment of the Inspectors as Accqcorp has not satisfied any of the criteria for the suspension of the order.

DISPOSITION

16. The application for suspension of Order No. 1 is dismissed. Board File No. 0872-12-HS, which is the appeal on the merits of this application, is to be forwarded to the Registrar.

0144-09-PS Ontario Nurses' Association, Applicant v. **Bayshore Home Health;** Bayshore Home Health, Sarnia; Bayshore Home Health, Chatham; Victorian Order of Nurses Sarnia-Lambton; Victorian Order of Nurses Chatham-Kent, Responding Parties v. Erie St. Clair Community Care Access Centre, Intervenor.

Bargaining Rights – Bargaining Unit – *Public Sector Labour Relations Transition Act* – Previously the Board had determined that the creation of clinics in Sarnia and Chatham-Kent for ambulatory clients constituted a "health services integration" under *PSLRTA* and declared that PSLRTA applied – Nursing services to these ambulatory clients were previously provided on a home care basis by VON-Sarnia and VON-Chatham-Kent, for whom ONA held bargaining rights Bayshore, a non-union employer, was the successful bidder to provide services to ambulatory clients through the clinics – The issue now before the Board under s. 22 of *PSLRTA* was the bargaining unit appropriate to Bayshore's operations after the health services integration having regard to the purposes of PSLRTA– Bayshore took the position that a bargaining unit restricted to the transferred service was appropriate, i.e. full-time RNs at the Clinics – ONA adopted the facts stated by Bayshore in response to a subsequent application for certification by another union, and argued that a bargaining unit of all RNs and all RPNs was appropriate to Bayshore's operations, given the high degree of integration of their work, terms and conditions of employment and supervision – The Board first noted that s. 22 does not confer bargaining rights upon a bargaining agent; rather section 23 requires a vote and where 40% or more of the bargaining unit were not represented by a bargaining agent, as was the instant case, "no union" had to be an option on the ballot – Whether or not ONA's bargaining rights with respect to the transferred services were preserved was incidental to the determination of what bargaining unit was appropriate for Bayshore's operations – Based on the facts stated by Bayshore in the other application, and not disavowed by Bayshore in this application, the Board found that a bargaining unit of all RNs and RPNs was appropriate to Bayshore's operations – Consideration of the four purposes of *PSLRTA* did not change this result, given the degree of integration of RNs and RPNs in Bayshore's operations: 1) a bargaining unit of all RNs and RPNs is more likely to "encourage best practices that ensure delivery of quality and effective public services that are affordable for taxpayers" 2) there were no other bargaining units to be rationalized and the bargaining unit consisting of RNs and RPNs would result in effective collective bargaining structures; 3) either bargaining unit will come into effect only if a majority of the employees in the bargaining unit vote that they wish to be represented by ONA, however, only the bargaining unit consisting of all RNs and all RPNs would facilitate collective bargaining and 4) although integrating RNs and RPNs may reduce workplace disputes in the future, permitting the expansion of bargaining rights, absent agreement of the parties may not – The Board found however that this last concern gave way to all the other factors and determined the bargaining unit appropriate for Bayshore encompasses all RNs and RPNs – Matter continues

BEFORE: *Ian Anderson*, Vice-Chair.

DECISION OF THE BOARD: August 30, 2012

1. This is an application by the Ontario Nurses' Association ("ONA") under section 22 of the *Public Sector Labour Relations Transition Act, 1997*, S.O. 1997, c. 21, Sched. B, as amended ("PSLRTA").

Background

2. The background to this application is fully stated in a previous decision of the Board dated May 2, 2011: 194 C.L.R.B.R. (2d) 89; [2011] O.L.R.D. No. 1487; 2011 CanLII 24546 (ON LRB) (the "May decision"), request for reconsideration denied, August 9, 2011, 2011 CanLII 48138 (ON LRB). What follows is a simplified summary.

3. The Victorian Order of Nurses Sarnia-Lambton ("VON-Sarnia") and the Victorian Order of Nurses Chatham-Kent ("VON-Chatham") (collectively "VON") and Bayshore Home Health ("Bayshore") provide and have provided home care nursing services pursuant to contracts with Erie St. Clair Community Care Access Centre ("ESC CCAC"). Faced with lengthening wait lists, increased costs and demands, in 2008 ESC CCAC decided to start delivering nursing care to some clients through clinics rather than in the clients' homes. ESC CCAC's goal was to rationalize services by transferring care for all ambulatory clients to the clinics. ESC CCAC tendered the contract for the creation of the clinics. Bayshore was the successful bidder. Clinics were established in Sarnia and Chatham Kent (the "Clinics").

4. The Sarnia Clinic began receiving client referrals in December, 2008. The Chatham Clinic began receiving client referrals in January, 2009.

5. ONA has bargaining rights with respect to a unit of "all" Registered Nurses ("RNs") in the City of Sarnia at VON-Sarnia and all full-time RNs at VON-Chatham at its Chatham Kent Site. The full description of the Sarnia bargaining unit is as follows:

> The Employer recognizes the Union as the bargaining agent of all Registered Nurses, and Nurses holding a Temporary Certificate of Nursing, employed in a nursing capacity by the Victorian Order of Nurses, Sarnia-Lambton Branch in the City of Sarnia, save and except Supervisors, persons above the rank of Supervisor and persons for whom any Trade Union held bargaining rights as of June 19, 1997.
>
> Clarity Note: For the purposes of clarity, this bargaining unit excludes the Marketing Person for the Occupational Health Program and includes Nurses in the Shift Nursing program.

The full description of the Chatham bargaining unit is as follows:

> The employer recognizes the Ontario Nurses' Association as the bargaining agent of all Registered Nurses and Graduate Nurses employed by VON Canada – Ontario Branch, Chatham-Kent Site in a nursing capacity at its Chatham-Kent Site, save and except nursing Supervisors, persons above the rank of Nursing Supervisor and persons regularly employed for not more than twenty-four hours (24) hours per week.

6. Bayshore's employees were not unionized and, other than as discussed below, continue not to be unionized.

7. ONA took the position that the creation of the clinics constituted a "health services integration" within the meaning of PSLRTA and brought an application under section 22 requesting the Board determine an appropriate bargaining unit. A precondition to this determination was that the Board exercise its discretion to declare that PSLRTA applied to this "event". In the May decision the Board made the declaration. For the purposes of PSLRTA, VON constituted the "predecessor employer" and Bayshore the "successor employer" in relation to the event.

8. Section 22(1) of PSLRTA provides:

> 22. (1) Subject to any agreement under section 20 that is in effect, the Board, upon the application of a successor employer or any bargaining agent that has bargaining rights, may by order determine the number and description of bargaining units that are appropriate for the successor employer's operations after the occurrence of an event to which this Act applies.

ONA's position is that the appropriate bargaining unit "includes both Registered Nurses ("RNs") as well as Registered Practical Nurses ("RPNs") employed by Bayshore to provide home care or clinical care in its Sarnia-Lambton and Chatham-Kent clinics." Bayshore's position is that the appropriate bargaining unit is:

> All Registered Nurses employed by Bayshore Home Health in a nursing capacity at its Nursing Clinics in Sarnia-Lambton and Chatham-Kent, save and except Nursing Supervisors, persons above the rank of Nursing Supervisor, and persons regularly employed for not more than twenty-four (24) hours per week.

9. The bargaining units proposed by ONA and Bayshore differ in three critical respects:

a. ONA's bargaining unit includes RPNs; Bayshore's does not.

b. ONA's bargaining unit includes full-time and part-time nurses; Bayshore's is restricted to full-time nurses.

c. ONA's bargaining unit includes nurses providing home care or clinical care; Bayshore's is restricted to nurses providing clinical care.

Notably, however, both ONA and Bayshore take the position that there should be a single bargaining unit encompassing both Clinics. Further, neither ONA nor Bayshore take the position that there should be a single bargaining unit encompassing all of Bayshore's employees.

Arguments

10. Both ONA and Bayshore make reference to *North Bay General Hospital*, [2009] O.L.R.D. No. 791 in which the Board commented:

> 34. In these applications the Board, has, broadly speaking been faced with two kinds of situations. The first category of situations is amalgamations of employers like cities, school boards and hospitals. In those situations the Board has tended to focus on that purpose of the

> Act concerned with "creating effective and rationalized bargaining unit structures".
>
> 35. The second category of situations primarily arose as a result out of [sic] more recent changes to the Act, and involve [sic] the transfer of services from one public institution (usually a hospital) to another. A review of the cases suggests that the Board often does not restructure bargaining units, but attempts to reduce the difficulties of service transfers by retaining the bargaining unit structure at the organization receiving the transferred services. However, each case must be decided on its own facts.

Both ONA and Bayshore observe that while this case involves a transfer of services rather than an amalgamation, it is not one in which the organization receiving the transferred services had an existing bargaining unit structure: Bayshore was not unionized. Thus, the Board's decision cannot be guided by a desire to reduce difficulties by retaining Bayshore's existing bargaining unit structure.

11. ONA argues that under PSLRTA, unlike the *Labour Relations Act, 1995*, the Board has held that there is no presumption in favour of preserving pre-existing bargaining unit structures: *Ottawa Transition Board*, 2001 CanLII 13101 (ON LRB) at para. 67. The Board must take into account the purposes of PSLRTA as well as the employer's operational needs in determining the appropriate bargaining unit: *North Bay General Hospital and North East Mental Health Centre*, 2011 CanLII 9692 (ON LRB) at para. 35.

12. ONA argues that its proposed bargaining unit is appropriate because it is the most consistent with the purposes of PSLRTA while meeting Bayshore's operational needs. In support of these arguments, ONA relies heavily upon the response which Bayshore filed to an application for certification under the *Labour Relations Act, 1995* made by the SEIU, Local 1 Canada on June 23, 2009, two months after this application was filed (Board File No. 0888-09-R). The unit of employees the SEIU sought was:

> all Registered Nurses at Bayshore Home Health that work out of the Sarnia office, in the City of Sarnia in the Province of Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff and on-call co-ordinators.

In its application the SEIU noted there were two work locations which were subject to the application: the clinic and Bayshore's offices.

13. In its response to SEIU's certification application, Bayshore argued that by virtue of section 28 of PSLRTA SEIU's application was barred by this application. By decision dated October 15, 2009, the Board (differently constituted) found that it was in fact barred. As part of its reasoning, the Board found (and it appears that Bayshore argued) that while the SEIU application was for all RNs working out of Bayshore's Sarnia offices, this included RNs working at the Sarnia Clinic.

14. In its response to the SEIU application, Bayshore also took issue with SEIU's proposed bargaining unit. Bayshore agreed that the appropriate bargaining unit was all RNs working out of its Sarnia office, but took the position that the term "Registered Nurses" included Registered Practical Nurses. In the alternative it asserted that the appropriate bargaining unit would be one which included all RNs and all RPNs. Because of its centrality to ONA's argument, it is useful to set out the relevant part of Bayshore's response to the SEIU application in full:

> The Responding Party has proposed a clarity note to the Applicant's proposed bargaining unit description. It is the Responding Party's position that the term Registered Nurses includes Registered Practical Nurses, and this should clearly be reflected in the bargaining unit description.
>
> In the event the Applicant disputes that Registered Practical Nurses are, in fact, Registered Nurses, it is the Responding Party's position that the Applicant's proposed bargaining unit description could not be appropriate for the reasons set out below.
>
> Registered Practical Nurses work interdependently side-by-side and within the same "work teams" as the employees in the Applicant's proposed bargaining unit on a daily basis, are scheduled in the exact same manner by the same Coordinators and perform the same work. Registered Nurses and the Registered Practical Nurses in Sarnia both work out of the same office and clinic, are supervised by the same Office Staff, and perform their duties for similar clients pursuant to the same Community Care Access Center ("CCAC") contracts. Further, Registered Nurses and Registered Practical Nurses in Sarnia are employed under the same terms and conditions of employment in that they are all Elect To Work employees paid by the visit, as opposed to on an hourly basis. Registered Nurses and Registered Practical Nurses are largely interchangeable and frequently perform relief duties for each other. On a final note, both Registered Nurses and Registered Practical Nurses participate in the same continued educational training programs and all regular clinical practice meetings.
>
> As such, Registered Nurses and Registered Practical Nurses share a community of interest and to separate the two groups would cause serious labour relations harm.
>
> Finally, the Responding Party employs individuals who regularly perform duties as on call RN's and RPN's (along with other job responsibilities) who are functionally integrated with the group the Applicant seeks to represent.

15. Based on Bayshore's submissions in the SEIU application, ONA argues that the RPNs worked interdependently with RNs, on the same work teams out of the same office and clinic, with the same clients, the same supervisors, and the same terms and conditions of employment and further the RNs and RPNs are largely interchangeable and they frequently perform relief duties for each other. Given this, ONA argues, Bayshore's operational requirements are best served by a single bargaining unit of RNs and RPNs. Further, ONA argues, the degree of integration also means that its own bargaining rights can only be fully preserved by a single bargaining unit of RNs and RPNs.

16. Bayshore takes a different view.

17. Bayshore notes that this application arises from the finding that the transfer of care for ambulatory clients by RNs employed by VON to the Bayshore Clinics constituted a health services integration.

18. Bayshore notes that ONA's application contained no allegation that there was a transfer of services provided by RPNs employed by VON and no allegation that the services provided by RNs employed by VON had been transferred to Bayshore's homecare operation, and sought no remedy in relation to any such transfer. Rather ONA sought a bargaining unit of RNs at Bayshore's Clinics. Consequently, there has been no finding that there has been a health services integration in relation to either RPNs or Bayshore's homecare operations. Furthermore, ONA has no bargaining rights in relation to RPNs employed by VON. Indeed, some of those RPNs are represented by other unions and ONA did not give notice to those unions.

19. Bayshore argues that in these circumstances, ONA is seeking to expand its bargaining rights beyond the classification of RNs and beyond the Clinics to include Bayshore's homecare operations and should not be permitted to do so. Bayshore argues that ONA is estopped from doing so at this time or alternatively that its attempt to do so constitutes an abuse of process.

20. Bayshore argues that the only determination made in the SEIU decision was that the SEIU application was barred by this application. The SEIU decision made no factual determinations of what would happen in this application.

21. Bayshore asserts that the services which were transferred to it are ordinarily performed at the Clinics by full-time RNs. Performance of these services by part-time employees (whether RNs or RPNs) or by full-time homecare employees (whether RNs or RPNs) is atypical and constitutes a de minimis portion of any such employee's work. Bayshore provides particulars in support of these assertions.

22. Bayshore argues that a bargaining unit of full-time Clinic nurses is appropriate to its operations. Further, Bayshore argues that any other bargaining unit configuration would be inconsistent with the purposes of PSLRTA.

23. Bayshore argues that the transfer in question has had no established impact upon any individual's employment. Bayshore asserts that the "vastly different business models, employing the use of different labour models" used by it and VON are part of the "landscape" which the Board should consider in this case.

24. Bayshore argues that this should cause the Board to "enhance the focus on an operational structure that is most in accordance with" Bayshore's operational requirements. It cites *Ottawa Transition Board*, [2001] OLRB Rep. January/February 92 at para. 25 for the proposition that the successor employer's view of what is most in its operational interests is an important consideration in determining what is appropriate.

25. Bayshore also notes that in the May decision the Board stated (at para. 94) that "PSLRTA serves to provide a mechanism for the preservation of bargaining rights when work is moved as a result of a health services integration." In the May decision the Board also cited *Children's Hospital of Eastern Ontario*, [2004] OLRB Rep. May/Jun. 519 ("*CHEO*") which noted the purpose of permitting PSLRTA to apply even in the absence of the movement of employees between two organizations is to "permit trade unions to protect and "follow" their bargaining rights when "their" work is transferred" from one organization to another. Further, in *Toronto (City)*, [1998] OLRB Sept./Oct. Rep. 772 the Board noted that its approach to PSLRTA applications has been an attempt to balance continuity and change. Within this context, regard should be had to the parties' settled collective bargaining patterns.

26. Bayshore also argues that to the extent that bargaining rights have been expanded pursuant to PSLRTA, it has often been through the rationalization of two or more existing bargaining units.

27. In this case, Bayshore argues, ONA's existing bargaining rights at VON are with respect to RNs, not RPNs. Further, the work transferred is the care of ambulatory care clients. That work is performed at the Clinics almost entirely by full-time RNs. The facts of this case are more akin to a sale of a business than previous PSLRTA applications. Finally, in this case, there were no pre-existing bargaining rights at Bayshore. Further, the bargaining rights which ONA has obtained through the application of PSLRTA are strictly in relation to RNs. There are no existing bargaining rights with respect to RPNs "at play" in this application.

Analysis and Decision

28. I begin by observing that the Board's determination of an appropriate bargaining unit or bargaining units under section 22 of PSLRTA does not confer bargaining rights upon bargaining agents. Rather, section 23 of PSLRTA requires the Board conduct a vote or votes to determine which bargaining agent will represent the employees in the bargaining unit(s) determined to be appropriate. Where 40 per cent or more of the employees in a bargaining unit were not represented by a bargaining agent immediately prior to the changeover date, the ballot must include having no bargaining agent as a choice. If more than 50 per cent of the votes are cast in favour of no bargaining agent, then section 23(8) provides that the bargaining rights of existing bargaining agents are extinguished.

29. In determining a bargaining unit appropriate to the successor employer's operations pursuant to section 22(1), the Board is required by section 22(7) of PSLRTA to have regard to the purposes of the Act. Section 1 establishes the following purposes of PSLRTA:

> 1. To encourage best practices that ensure the delivery of quality and effective public services that are affordable for taxpayers.
>
> 2. To facilitate the establishment of effective and rationalized bargaining unit structures in restructured broader public sector organizations.
>
> 3. To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees following restructuring in the broader public sector and in other specified circumstances.
>
> 4. To foster the prompt resolution of workplace disputes arising from restructuring.

30. Many of Bayshore's arguments, and one of ONA's arguments, are predicated upon the assumption that in determining the appropriate bargaining unit the Board should seek to preserve ONA's bargaining rights with respect to the clinical work that was transferred and, Bayshore argues, only that work. This is incorrect, as is apparent from an examination of the statutory scheme as it applies to this case.

31. As a result of the finding in the May decision, section 14(1) of PSLRTA applied:

> On the changeover date, each bargaining agent that had bargaining rights in respect of a bargaining unit of a predecessor employer immediately before the changeover date has bargaining rights in respect

> of a like bargaining unit of the successor employer, but the description of the bargaining unit shall be such as to include only,
>
> • (a) employees who immediately before the changeover date were employees of the predecessor employer in the bargaining unit for which the bargaining agent had bargaining rights; and
>
> • (b) employees who are hired to replace employees described in clause (a).

Bayshore has in fact hired no RNs who were employees of VON immediately before the changeover date. In the result, ONA has bargaining rights with respect to "all" RNs employed by Bayshore "in the City of Sarnia" as a result of the fact that Bayshore is a successor employer to VON-Sarnia and bargaining rights with respect to all full-time RNs employed by Bayshore "at VON-Chatham's Chatham-Kent site" (whatever meaning that may have in a "like bargaining unit" of Bayshore) as a result of the fact that Bayshore is a successor employer to VON-Chatham, but in each case the bargaining unit description is such that it includes no employees.[1] Nonetheless, it is these bargaining rights which give ONA standing under PSLRTA to bring this application for a determination of the number and description of bargaining units that are appropriate for the successor employer's operations. As the successor employer, Bayshore could also have brought the application.

32. Thus, while the transfer of clinical work served to give ONA standing to bring this application for the determination of the appropriate bargaining unit, the bargaining rights which ONA currently enjoys by virtue of section 14 are not restricted to the clinical work. Rather, ONA has bargaining rights with respect to "all" RNs employed by Bayshore in the City of Sarnia as a result of the fact that Bayshore is a successor employer to VON-Sarnia and bargaining rights with respect to all full-time RNs employed by Bayshore at VON's "Chatham-Kent site" (whatever meaning that may have in a "like bargaining unit" of Bayshore) as a result of the fact that Bayshore is a successor employer to VON-Chatham, but in each case the bargaining unit description is such that it is limited to RNs who were employed by VON at the time of the transfer. If Bayshore were to employ such a former VON RN in the provision of homecare, that RN would fall within the ONA bargaining unit. These bargaining rights exist on an interim basis pending the Board's determination of an appropriate bargaining unit(s) under section 22. Further, ONA's bargaining rights are subject to being extinguished by the vote mandated by section 23.

33. It is worth noting that in this respect PLSLRTA is similar to the sale of business provisions under section 69 of the *Labour Relations Act, 1995*. A sale of all or part of a unionized business gives rise to bargaining rights for the union with respect to the purchaser. Those bargaining rights are not necessarily limited to the business that was purchased. Where, however, there has been an intermingling of employees of the purchased business with other businesses of the purchaser, an application may be made to the Board for, among other things, determination of the appropriate bargaining unit. In determining the appropriate bargaining unit, the Board seeks to avoid serious labour relations problems in the future. Any preservation of the bargaining rights the union obtained with respect to the purchaser is

---

• [1] I note as well that PSLRTA does not require Bayshore to hire any of the VON RNs. Section 16 of PSLRTA provides:

•

> • Nothing in this Act requires a successor employer to hire any employee of a predecessor employer except to the extent that the successor employer may be required to do so under a collective agreement that binds the successor employer.

•

• Of course, a refusal by the successor employer to hire such an employee tainted by anti-union animus would be a violation of the *Labour Relations Act, 1995*.

incidental. The Board's determination of the appropriate bargaining unit may in fact result in the extinguishment of the bargaining rights of the union, and indeed, because section 69 gives the Board the discretion to order a vote but does not make it mandatory, this may happen without a vote. These principles are illustrated by *Kitchener Waterloo Hospital*, [1991] OLRB Rep. Oct. 1130 and *The Brantford General Hospital*, [1994] OLRB Rep. Aug. 1103.

34. Thus, it is not accurate to say that there are no existing bargaining rights at Bayshore. ONA has such bargaining rights on an interim basis. They are, however, restricted to RNs who were formerly employed by VON. Obviously a restriction based purely on prior employment is not conducive to good labour relations on an ongoing basis: the bargaining unit for which ONA currently has bargaining rights is not appropriate for the purposes of section 22. Neither Bayshore nor ONA suggest that an appropriate bargaining unit would be subject to such an artificial distinction.

35. Bayshore, as noted, takes the position that the bargaining unit appropriate for its operations is one restricted to full-time RNs working at its Clinics. There are, however, some difficulties in applying that approach in this case.

36. In its response to the SEIU application, Bayshore clearly and emphatically stated that only a bargaining unit of all RNs and all RPNs was appropriate. In that response Bayshore asserted RPNs worked interdependently with RNs, on the same work teams out of the same office and clinic, with the same clients, the same supervisors, and the same terms and conditions of employment and further the RNs and RPNs are largely interchangeable and they frequently performed relief duties for each other. In making those assertions, Bayshore did not distinguish between full-time and part-time employees: Bayshore did not suggest that in performing that work full-time RNs have different supervisors or different terms and conditions of employment than RPNs or part-time RNs. Indeed, Bayshore stated that "on call" RNs and RPNs were "functionally integrated" with the group sought by SEIU. These facts all suggest that a bargaining unit appropriate to Bayshore's operations is one which includes all RNs and all RPNs.

37. In its response to ONA's submissions Bayshore did not disavow the facts which it pled in response to the SEIU application, and which ONA has adopted in this application. Rather, as noted, it focused upon the work that was transferred, arguing that it is performed in the Clinics primarily by full-time RNs. Section 22, however, does not require the Board to determine who performs the work that has been transferred. Rather the Board is required to determine what bargaining unit or bargaining units are appropriate for Bayshore's operations after the transfer of the work. Nothing in PSLRTA suggests any presumption that the appropriate bargaining unit is restricted to the services which were transferred. Such a bargaining unit may not be appropriate for Bayshore's operations and may not be consistent with the purposes of the Act.

38. In support of its position, Bayshore also relies on the following facts:

- ONA's application contained no allegation that there was a transfer of services provided by RPNs employed by VON and no allegation that the services provided by RNs employed by VON had been transferred to Bayshore's homecare operation, and sought no remedy in relation to any such transfer;
- There has been no finding that there has been a health services integration in relation to either RPNs or Bayshore's homecare operations; and

- ONA has no bargaining rights in relation to RPNs employed by VON and some of those RPNs are represented by other unions.

In my view, none of these facts have anything to do with what is an appropriate bargaining unit for *Bayshore's* operations. In short, they are irrelevant.

39. Bayshore notes that on its application ONA sought a bargaining unit only of RNs at its clinics. It argues that ONA is estopped from now seeking a larger bargaining unit. ONA replies, and I agree, that Bayshore has failed to establish any detrimental reliance on its part. Accordingly, no estoppel arises. Bayshore argues that ONA's change in position constitutes an abuse of process. ONA replies, and I agree, that Bayshore has not shown how ONA's change in position constitutes an abuse of process. ONA's current position is based upon information with respect to Bayshore's operational requirements provided by Bayshore in response to the SEIU application. That information did not exist at the time that ONA filed this application. In any event, PSLRTA requires the Board to determine the appropriate bargaining unit. The Board is not bound by the positions of the parties, original or subsequently amended, in making this determination.

40. Bayshore argues that the bargaining rights in respect of Bayshore's RPNs should not be "in play" for two reasons. First, the work performed by RPNs at VON formed no part of this application and the parties who hold bargaining rights with respect to those classifications have not been given notice by ONA. Second, ONA did not provide any notice that bargaining rights would be sought in respect of RPNs, but only sought bargaining rights with respect to RNs at Bayshore's Clinics.

41. I agree that the work performed by RPNs at VON form no part of this application. Accordingly, the unions with bargaining rights with respect to those RPNs were not entitled to notice of these proceedings. Rather, the work which gives rise to this application was performed by RNs at VON. As explained above, it is the transfer of that work to Bayshore which gives rise to bargaining rights by ONA with respect to Bayshore and gives ONA standing to bring this application. There is no allegation by Bayshore or any union holding bargaining rights with respect to RPNs at VON that work performed by those RPNs was transferred to Bayshore, let alone a declaration by this Board that any such transfer constitutes a health services integration to which PSLRTA applies. None of those unions have: bargaining rights with respect to Bayshore, consequential on such a declaration or otherwise; any standing in this application; or any legal interest in the determination in this application of the appropriate bargaining unit(s) at Bayshore. The bargaining rights with respect to Bayshore's RPNs are "at play", however, as part of the determination of what constitutes a bargaining unit appropriate to Bayshore's operations after the transfer of the work performed by VON's RNs, having regard to the purposes of PSLRTA.

42. Bayshore makes reference to its revenues and cost structure. It states that it attempts to provide services in a highly efficient manner so as to maximize internal resources and minimize cost outlays. To operate as efficiently as possible, Bayshore states that it draws a distinct line between the roles and functions performed by RNs, RPNs, Personal Support Workers and Administrative and Management employees. It states that it seeks to ensure services are provided by a qualified candidate at the lowest cost to Bayshore. Bayshore also asserts that RNs and RPNs perform different functions. In doing so, Bayshore does not address the apparent discrepancy with its response to the SEIU application, in which it stated that RNs and RPNs are interchangeable.

43. It is not clear why any of this matters to the determination of the appropriate bargaining unit. Presumably every employer seeks to deliver services in the most cost efficient manner, organizes its

workforce accordingly, and pays its employees differently based upon factors such as skills, qualifications and value of the services which they provide. In a unionized workplace these considerations are generally reflected in collective agreement provisions providing for retained management right to organize the work force and pay based upon classification held. None of this speaks to the appropriateness of the bargaining unit to the employer's operations having regard to the purposes of PSLRTA. If Bayshore is attempting to suggest that the bargaining unit should encompass as few employees as possible in order to leave it with more non unionized employees on the assumption that non unionized employees are lower cost, then I disagree: the purposes of PSLRTA include "the facilitation of collective bargaining between employers and trade unions that are the freely designated representatives of the employees following restructuring in the broader public sector and in other specified circumstances."

44. Bayshore argues that the Board should consider the fact that "the employees who will be affected by the Board's determination have no bargaining history to refer to and there is no bargaining unit structure that applied to any of them prior to integration." The premise of this argument seems to be that the employees in what ever bargaining unit the Board determines to be appropriate will have a bargaining unit imposed upon them. This is not correct. As noted earlier, section 23 requires that a representation vote be held. Further, section 23(5) provides that since 40 per cent or more of the employees in the bargaining unit were not represented by a bargaining agent immediately before the changeover date, the ballot must include having no bargaining agent as a choice.

45. Thus, Bayshore's submissions do not provide a basis for concluding that a bargaining unit restricted to full-time RNs at its Clinics would be appropriate. Its response to the SEIU application, on the other hand, compels the conclusion that from a labour relations perspective all RNs and all RPNs are integrated to a degree that a bargaining unit encompassing both would be appropriate for Bayshore's operations. Indeed, as noted by ONA in reply, some support for this is found in Bayshore's submissions in this application: while Bayshore asserts that its "community nurses" do nearly all of their work in the homecare setting, it states that a few community nurses may pick up a clinic shift, which may represent up to 15-20% of their hours. It cannot be said, therefore that there is no overlap between the work of so called community care nurses and Clinic nurses.

46. This conclusion is also consistent with the Board's preference for larger bargaining units. On an application for certification, this preference may give way to a competing concern of ensuring access to collective bargaining. The Board has noted, however, that this in not a consideration in cases under PSLRTA: see for example *Ottawa-Carleton Catholic District School Board*, [1998] OLRB Rep. May/June 469.

47. Consideration of the purposes of PSLRTA does not change this result.

48. With respect to the first purpose, as between a bargaining unit restricted to full-time RNs working in the Clinics and a bargaining unit of all RNs and all RPNs, the operational concerns identified by Bayshore in its response to the SEIU application suggest that a bargaining unit of all RNs and all RPNs is more likely to "encourage best practices that ensure the delivery of quality and effective public services that are affordable for taxpayers." It may be the case that the same could be said with respect to a different, larger bargaining unit, but there is no information before me which would suggest what the parameters of such a bargaining unit would be. In this respect, I note as well that while there is no express agreement between the parties that an "all employee" bargaining unit is not appropriate, neither party suggests that it is.

49. With respect to the second purpose, there are no other bargaining unit structures to be rationalized. A bargaining unit consisting of all RNs and all RPNs is effective for the reasons stated above; similarly, a bargaining unit restricted to full-time RNs working in the Clinics is not.

50. With respect to the third purpose, either bargaining unit will come into effect only if a majority of the employees in the bargaining unit vote that they wish to be represented by ONA. Only the bargaining unit consisting of all RNs and all RPNs will, however, result in effective collective bargaining given the degree of integration between RNs and RPNs described by Bayshore in its response to the SEIU application, adopted by ONA and not disavowed by Bayshore in this application.

51. The fourth purpose is:

> To foster the prompt resolution of workplace disputes arising from restructuring.

This is the one purpose where the answer is less clear cut. On the one hand, given the degree of integration between RNs and RPNs pled by Bayshore and adopted by ONA, a bargaining unit encompassing both will likely reduce workplace disputes on a go forward basis. On the other, ONA's existing bargaining rights are with respect to its traditional craft unit of RNs: they do not include RPNs. Permitting expansion of bargaining rights, absent an agreement of the parties or the need to rationalize bargaining unit structures, does not foster the prompt resolution of disputes arising from restructuring. On its own, this would cause me to conclude that should ONA wish to pursue bargaining rights for a bargaining unit of RNs and RPNs, it should withdraw this application and file an appropriate application for certification under the *Labour Relations Act, 1995*. However, on the facts of this case this concern gives way to the other factors described.

52. Accordingly, having regard to the purposes of PSLRTA, one bargaining unit is appropriate for Bayshore's operations after the health services integration in question and that the bargaining unit will encompass all RNs and all RPNs.

53. There are various ways in which such bargaining units may be specifically described, as evidenced by the three bargaining unit descriptions with respect to RNs set out earlier in this decision. The parties' submissions do not address this point. Further the parties have not addressed the arrangements for the vote. Accordingly, the parties shall have one week from the date of this decision to file their brief (not to exceed three (3) pages) submissions on these matters and one week thereafter to file brief (not to exceed two (2) pages) replies. The Board will decide these issues on the basis of the submissions filed, having regard to any agreements which the parties reach in the interim.

54. I make one final comment. PSLRTA contemplates expeditious resolution of disputes. This application has been anything but. In part, this arises from the fact that this is a case of first instance. Nonetheless, this application must be brought to a conclusion, if only because it serves to bar applications for certification in relation to some of Bayshore's employees, as demonstrated by the Board's decision with respect to the SEIU application. Accordingly, in making their submissions with respect to vote arrangements, the parties should have regard to the need to conclude this application without further delay.

55. I am seized.

0468-12-M Communications, Energy and Paperworkers Union of Canada and its Local 7-0-1, Applicant v. **Dilico Anishinabek Family Care**, Responding Party.

Jurisdictional Dispute – Conciliation – Bargaining Rights – Reference – Voluntary Recognition – The Minister of Labour asked the Board whether she has the authority to appoint a conciliation officer in this matter, involving a bargaining unit of employees who work at various Dilico Anishinabek Family Care ("Dilico") centres – The Union obtained bargaining rights from the Canada Industrial Relations Board ("CIRB") – Dilico participated in the CIRB proceedings but always objected to CIRB jurisdiction over its labour relations – The Union issued notice to bargain a second renewal of the collective agreement, followed by a request to the Ontario Ministry of Labour for the appointment of a Conciliation Officer, both of which were objected to by Dilico – Dilico argued that it had never voluntarily recognized the union, that the union was never certified by the Board, and that Dilico had only engaged in bargaining because the Union had previously obtained those rights from the CIRB – The Union argued that Dilico's voluntary recognition for the Union was a product of the first collective agreement and was confirmed by the execution of the second collective agreement – Assuming, without deciding, that the Board has jurisdiction over the labour relations of Dilico, the Board stated that the voluntary recognition provision provides an alternative route to the normal certification procedures and that the language of the statute contemplates intention – Dilico's lack of intention was manifest throughout and their participation in the CIRB proceedings should not be seen as voluntary – Additionally, the Union was never certified by the Board – Accordingly, the Union had no legal right to serve an enforceable notice to bargain, which is a prerequisite to the appointment of a conciliation office by the Minister – The question referred to the Board is answered in the negative

BEFORE: *James Hayes*, Vice-Chair.

DECISION OF THE BOARD: July 16, 2012

1. A Ministerial reference was made to the Board pursuant to ss.115(1) of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") with the following question to be answered:

> Does the Ontario Ministry of Labour have the authority to appoint a conciliation officer pursuant to section 18 of the *Labour Relations Act, 1995* with respect to this bargaining unit?

Process

2. The parties filed detailed submissions. They agreed that the Board should make the requested determination on the basis of those submissions. The central facts giving rise to this reference were not in dispute. Accordingly, no hearing was convened.

Facts

3. The Communications, Energy and Paperworkers Union of Canada ("CEP") represents employees across a number of industries in the Province of Ontario. As described more fully below, the

CEP and its Local 7-0-1 (collectively the "Union") entered into successive collective agreements with Dilico Anishinabek Family Care ("Dilico") following the issuance of certificates by the Canada Industrial Relations Board ("CIRB").

4. In June, July, and August 2004 the CEP filed applications at the CIRB with respect to various Dilico locations. Dilico objected that its labour relations were subject to provincial and not federal jurisdiction. The CIRB rejected that submission and issued final certificates to the CEP on August 5, 2005. The CIRB released its reasons for decision on the jurisdictional issue on February 5, 2010.

5. Dilico and the Union concluded a first collective agreement with a term of April 1, 2006 to March 31, 2009. A renewal collective agreement was signed on November 16, 2010 which bore the term of April 1, 2009 to March 31, 2012. Throughout the currency of those collective agreements, the Union continued to represent employees in the bargaining unit.

6. Prior to the negotiation of the renewal collective agreement, by letter dated April 20, 2009, Dilico advised the Union that:

> Although Dilico is prepared to negotiate, in the event that it is determined that the Canada Industrial Relations Board has no jurisdiction, Dilico will not be bound by any collective agreement reached nor should it[s] willingness to negotiate be construed as recognition of the Communications, Energy and Paperworkers Union of Canada and its Local 7-0-1.

7. On November 4, 2010 the Supreme Court of Canada released two decisions concurrently: *NIL/TU,O Child and Family Services Society* v. *B.C. Government and Service Employees' Union*, [2010] 2 S.C.R. 696 and *Communications, Energy and Paperworkers Union of Canada* v. *Native Child and Family Services of Toronto* [2010] 2 SCR 737. In these decisions, the Supreme Court of Canada held that the labour relations of the two operations at issue, which provide health and welfare services to Aboriginal families, fell within provincial jurisdiction.

8. On or about December 12, 2011, the Union filed a complaint pursuant to s.97 of the *Canada Labour Code* ("Code") alleging that Dilico had engaged in conduct in contravention of the Code.

9. Dilico filed its response to the complaint on or about January 6, 2012. In that response, Dilico raised an issue with respect to the CIRB's jurisdiction to entertain the complaint. In essence, Dilico advised the CIRB that it disputed a number of the findings of fact relied upon by the CIRB when it concluded that Dilico's labour relations fell within federal jurisdiction. Dilico further advised the CIRB that the jurisdictional issue was currently being considered by the Canadian Human Rights Commission ("CHRC") with respect to an unrelated matter.

10. The position of the Union before the CIRB is that Dilico remains subject to the Code and that the jurisdictional issue should be dismissed.

11. On or about April 26, 2012, Dilico wrote to the CIRB advising that the CHRC had released two decisions dealing with whether its labour relations were subject to provincial or federal jurisdiction. Relying on the Supreme Court of Canada's decisions in *NIL/TU,O* and *Native Child*, the CHRC held that Dilico's labour relations were subject to provincial jurisdiction. Dilico enclosed the decisions of the CHRC for the CIRB's consideration.

12. As the result of the decisions of the Supreme Court of Canada in *NIL/TU,O, supra* and *Native Child supra,* Dilico has requested that the CIRB review, reconsider and rescind its decision that it has jurisdiction over Dilico's labour relations and its Orders certifying the Union.

13. To date, the CIRB has not disposed of the jurisdictional issue raised by Dilico.

14. By way of a letter dated January 4, 2012, the Union advised Dilico of its intent to bargain a second renewal of the collective agreement.

15. By way of a further letter dated March 26, 2012, the Union clarified that it was issuing notice to bargain pursuant to s. 16 of the Act.

16. On March 29, 2012, Dilico responded to the Union's correspondence of March 26,2012 advising the Union as follows:

> CEP Local 7-0 is neither certified under the Labour Relations Act, 1995 as bargaining agent for Dilico Anishinabek Family Care's employees nor has it been voluntarily recognized by Dilico Anishinabek Family Care. Accordingly, CEP Local 7-0's attempt to give Notice to Bargain, as set out in your correspondence dated March 26, 2012 is invalid and of no force or effect.

17. Disagreeing with the position taken by Dilico, the Union filed a request for the appointment of a Conciliation Officer pursuant to s.18 of the Act on April 2, 2012.

18. On April 3, 2012, Dilico wrote to the Ministry of Labour objecting to the Union's request for the appointment of a Conciliation Officer.

19. On May 8, 2012, the Union wrote to the Ministry of Labour asserting that the Ministry does have the jurisdiction to appoint a conciliation officer in this matter.

20. On May 14, 2012 the instant reference was made to the Board.

Employer Submissions

21. Dilico submits that there is a threshold question as to whether or not the Board has jurisdiction over its labour relations. In any event Dilico states that at no time was it certified by the Board nor did it ever voluntarily recognize the Union. In such a situation the Union had no right to give notice to bargain under the Act which is a precondition to its right to access the appointment of a conciliation officer.

22. The core facts are undisputed. The first collective agreement flowed directly from the CIRB certificates. Also, its April 20, 2009 correspondence to the Union communicated Dilico's position expressly; that is, that Dilico would not be bound to a collective agreement should it be determined that the CIRB was without jurisdiction, and, that its willingness to negotiate should not be construed as recognition of the Union.

23. Board jurisprudence, which assesses intention to have entered into a voluntary recognition agreement on the basis of objective criteria, is inapplicable given the April 20, 2009 correspondence. That letter states Dilico's opposite intention which was communicated unequivocally to the Union.

Dilico engaged in bargaining only because the Union had previously obtained bargaining rights from the CIRB; it did not voluntarily engage to do so.

24. In summary, Dilico submits that:

> a to accept the Union's position that the collective agreement entered into in compliance with the parties' obligations under the *Canada Labour Code* constitutes a valid recognition agreement would be to accept the proposition that, the mere presence of the elements that may confirm the existence of a voluntary recognition agreement in some cases, is sufficient to found a determination of voluntary recognition in every case, even in the face of clear evidence of a contrary intention; and,
>
> b. to accept the Union's argument would be to accept the proposition that every union that is certified under the Act or the Code is being voluntarily recognized by the employer--which certainly is not the case.

Union Submissions

25. The Union suggests that the Board ought not to entertain Dilico's first position, that the referral should not be entertained until the question of provincial jurisdiction is addressed, given that Dilico takes that view itself.

26. Dilico's voluntary recognition of the Union was actually the product of the first collective agreement which was merely confirmed by the execution of the second collective agreement. The April 20, 2009 letter cannot be applied retroactively so as to undo Dilico's clear, unequivocal and unconditional recognition of the Union pursuant to the first collective agreement.

27. The Union points to ss.7(3) of the Act, *Pine Valley Enterprises Inc.* [2007] O.L.R.D No. 4441, and *Brick and Allied Craft Union of Canada v. E.S. Fox Limited,* 2009 CanLII 17314 ON LRB in support of its claim that Dilico's purported voluntary recognition is demonstrated by its entering into a collective agreement with the Union. The collective agreement(s) are in writing, signed by the parties, and include recognition that the employer recognizes the Union as the exclusive bargaining agent for a defined bargaining unit. Where a union and employer are parties to a voluntary recognition agreement and a party has issued a valid notice to bargain, then ss. 18(1) of the Act requires that the Minister shall appoint a conciliation officer.

28. In response to Dilico, the Union submits that the collective agreements in effect 'trump' the April 20, 2009 letter to which the Union did not agree in any event. The letter was not negotiated nor did it form any part of the collective agreement which followed. The letter should be read as being directed solely at the CIRB process and says nothing about any possible jurisdiction under the Act. Dilico limited its reservations to "negotiations" and did not take any further opportunity to seek to reserve its rights in respect of the effect (or lack thereof) of executing a collective agreement on the recognition of the Union's bargaining rights. Dilico could have, but did not, negotiate a recognition clause which was "certificate dependent"; that is, which would have made the collective agreement expressly dependent upon the continuing existence of CIRB certificates.

29. The Union relies upon *Cable TV Limited* [1980] 2 Can LRBR 381 and *Jervis B. Webb Company of Canada, Ltd (Re)* [2006] C.I.R.B.D. No 2. It argues that the CIRB has found that a collective agreement, entered into provincially, continues to be effective federally as a result of the

employer's voluntary recognition of a union pursuant to the recognition clause in a collective agreement. The Union submits that the CIRB's analysis applies on all fours with the circumstances raised in the instant matter.

30. Finally, the Union argues that its notice to bargain was issued with respect to a second collective agreement. Therefore, and notwithstanding the reference to s.16, notice to bargain was in reality issued pursuant to s.59 of the Act and, therefore, there is no requirement to demonstrate that a voluntary recognition agreement was entered in the first place.

Employer Reply

31. Insofar as *Cable TV* and *Jervis B. Webb* are concerned, Dilico argues that they were decided pursuant to a different statutory regime and were cases where the factual circumstances were very different. In neither of these cases was the CIRB addressing a situation where an employer had expressly not voluntarily recognized a union through correspondence delivered prior to negotiating the collective agreement. Dilico notes that at no time did the Union challenge its assertion, that Dilico would not be bound by any collective agreement reached in the event that the CIRB was found to have no jurisdiction, nor should its willingness to negotiate be construed as recognition of the Union.

Decision

32. Relevant provisions of the Act read as follows:

> **7.** (3) Where an employer and a trade union agree that the employer recognizes the trade union as the exclusive bargaining agent of the employees in a defined bargaining unit and the agreement is in writing signed by the parties and the parties have not entered into a collective agreement and the Board has not made a declaration under section 66, another trade union may apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the recognition agreement only after the expiration of one year from the date that the recognition agreement was entered into.
>
> ...
>
> **16.** Following certification or the voluntary recognition by the employer of the trade union as bargaining agent for the employees in the bargaining unit, the trade union shall give the employer written notice of its desire to bargain with a view to making a collective agreement.
>
> ...
>
> **18.** (1) Where notice has been given under section 16 or 59, the Minister, upon the request of either party, shall appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.
>
> ...
>
> (3) Where an employer and a trade union agree that the employer recognizes the trade union as the exclusive bargaining agent

> of the employees in a defined bargaining unit and the agreement is in writing signed by the parties, the Minister may, upon the request of either party, appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

33. Dilico proposes that this reference should not be considered unless and until the Board should determine that its labour relations are subject to provincial jurisdiction. I do not propose to proceed in that manner. As I understand it, that issue is currently alive before the CIRB. I propose to decide this reference by assuming, without deciding, that the Board would have jurisdiction over the labour relations of Dilico.

34. Despite the interesting submissions made on the merits by the Union, I am not satisfied that they should prevail.

35. The whole point of the ss.18(3) voluntary recognition provision is that it provides an alternative route to the normal certification procedures. If the statutory requirements are met, a voluntary recognition agreement will then trigger other provisions in the Act. The legislature has seen fit to set certain minimum requirements which must be met at the outset however, which is not surprising given the labour relations implications of voluntary recognition.

36. The language of the statute contemplates intention. The statute also requires that that intention take physical expression by the mutual execution of an agreement in writing. In most cases, there is no confusion but this is not always so. In some cases a party, typically an employer, may deny that its conduct has brought it within the confines of ss.7(3). Board jurisprudence is replete with examples where it has been necessary to consider whether or not parties had the requisite intention. The Board has also been called upon to consider what documents, or combination of documents, are sufficient to comprise such an agreement in writing. In such cases evidence of subjective intention is seldom available. The Board will look at objective criteria in order to assess the question of intention.

37. On the facts before the Board in this case, I conclude that Dilico has not entered into a voluntary recognition agreement within the meaning of the Act. Nor in my opinion should the collective agreement(s) themselves be understood to be valid voluntary recognition agreements.

38. All of Dilico's previous engagements with the Union were predicated upon CIRB certification processes and certificates. There was nothing voluntary about Dilico's participation in the CIRB proceedings. Dilico was required to participate as it was also required to abide by the post certification obligations imposed by the Code. Dilico could scarcely have stated more clearly to the Union than it did that the renewal collective agreement should not be regarded as any form of voluntary recognition. The subjective intention of Dilico concerning voluntary recognition, shall I say lack of intention, has been manifest throughout.

39. In such circumstances, it would require remarkable and unacceptable contortion to conclude that Dilico's patent lack of intention should be displaced by reference to the conventional Board jurisprudence. While the Board is occasionally required to divine unstated intention from an analysis of objective facts, including written documents, no such exercise is required here. Cases such as *Pine Valley Entertainment, supra.*, are not apposite in this factual context. There is simply no need to look for employer intention. The lack of employer intention to voluntarily recognize the Union has always been staring the Union in the face.

40. The Union relies upon certain CIRB case law.

41. In *Cable TV Limited,* the union in question had originally been certified under the labour legislation of Quebec. When the constitutional jurisdiction of the provincial authority was challenged, the union brought an application for certification under the Code. The CIRB found that where a collective agreement was entered following certification by a provincial body that had no jurisdiction, a standard contractual recognition clause was sufficient to support a finding of voluntary recognition for purposes of the Code. Pointing directly to *Cable TV Limited, supra.,* the Union submits that the Board should follow the conclusion of the CIRB that a "collective agreement concluded under provincial authority between [a] certified union and [an] employer constitutes, for the purposes of the federal code, a collective agreement concluded between a voluntarily recognized union and an employer. It is binding upon the parties, just as a collective agreement negotiated with a certified union is, and it has the same effects."

42. With all due respect, and whatever may be the case under the Code, I do not find such an argument persuasive having regard to the patent lack of intention of Dilico to voluntarily recognize the Union in this case. Dilico did not in my opinion "agree" to recognize the Union within the meaning of ss.7(3) of the Act; Dilico was required to do so by operation of Code procedures. CIRB certificates compelled Dilico to accept a standard recognition clause obtained under the federal regulatory scheme when it negotiated a collective agreement with the Union as the Code anticipates should occur in the normal course. Such a recognition clause may not reasonably be described as conferring voluntary recognition as that concept is understood under the Act. Furthermore, I am entirely unpersuaded that there was some kind of onus upon Dilico to negotiate a contractual 'right to exit' provision, in the event that it was determined that the CIRB lacked jurisdiction, to inoculate itself against some kind of deemed voluntary recognition at some later date.

43. In *Jervis B. Webb, supra.,* the CIRB had occasion to consider ss.44(3) of the Code and on the facts of that case found it to be inapplicable in that there had been no "change of activity" as required by the subsection which reads:

> 44. **(3)** Where, as a result of a change of activity, a provincial business becomes subject to this Part, or such a business is sold to an employer who is subject to this Part,
>
> (*a*) the trade union that, pursuant to the laws of the province, is the bargaining agent for the employees employed in the provincial business continues to be their bargaining agent for the purposes of this Part;
>
> (*b*) a collective agreement that applied to employees employed in the provincial business at the time of the change or sale continues to apply to them and is binding on the employer or on the person to whom the business is sold;
>
> (*c*) any proceeding that at the time of the change or sale was before the labour relations board or other person or authority that, under the laws of the province, is competent to decide the matter, continues as a proceeding under this Part, with such modifications as the circumstances require and, where applicable, with the person to whom the provincial business is sold as a party; and

> (*d*) any grievance that at the time of the change or sale was before an arbitrator or arbitration board continues to be processed under this Part, with such modifications as the circumstances require and, where applicable, with the person to whom the provincial business is sold as a party.

44. Under the Act however, there is no provision of any kind which continues the bargaining agency of a union originally certified federally should that bargaining agent become subject to provincial regulation for whatever reason. The Act is simply silent. Once again, I accept Dilico's submission that it is not tenable to conclude that CIRB certification, followed by a collective agreement with a recognition clause, is sufficient to support a finding that every union in such a situation is also voluntarily recognized by the signatory employer under the Act. As Dilico points out, an equivalent Ontario provision to ss.44(3) of the Code, namely *The Labour Relations and Employment Statute Law Amendment Act, 1992* (Bill 40), S.O. 1992, c.21, s.64.1 was repealed in 1995.

45. For the foregoing reasons I find that, on the facts before the Board in this case, Dilico was not a party to a voluntary recognition agreement within the meaning of ss.18(3) of the Act. Dilico was certified by the CIRB and conducted itself under the Code.

46. The Board understands that the question of whether or not Dilico may be required to continue to accept that it is subject to federal regulation is an issue presently before the CIRB. It is sufficient, for purposes of answering the question posed by this reference however, to find that, whether or not Dilico may be subject to provincial regulation, it has neither been certified by the Board nor entered into a valid voluntary recognition agreement. Accordingly, the Union had no legal right to serve an enforceable notice to bargain within the meaning of either s.16 or s.59 of the Act, which notice is a prerequisite to the appointment of a conciliation officer by the Minister pursuant to s.18.

Disposition

47. The question referred to the Board is answered in the negative.

0955-11-R Public Service Alliance of Canada, Applicant v. **Defense Contract Management Agency - Americas (Canada)**, Responding Party.

Certification – Parties – Reconsideration – *State Immunity Act* – The Board previously granted DCMA's request to reconsider its decision certifying PSAC and directed a hearing to hear the evidence with respect to DCMA's claim for sovereign immunity under the *State Immunity Act* – The two issues were whether: 1) DCMA submitted (or attorned) to the jurisdiction of the OLRB as specifically contemplated by s. 4 of the *SIA*; and 2) the "commercial activity" exception to immunity applied, as specifically contemplated by s. 5 of the *SIA* – On the first issue the Board noted that an entity entitled to immunity that unknowingly takes a step in a proceeding can only escape having attorned to the authority of the court if the facts "could not reasonably have been ascertained" – The Board found the following occurred: PSAC served the certification application on the Commander, who was an individual who had authority to enter into agreements; the Commander consulted with DCMA's own counsel in Virginia; a Response was filed which raised substantive issues, explicitly acknowledged it was an agency of the US Department of

Defence, it agreed to a vote and where it would be conducted, proposed individuals as scrutineers and filed schedules of employees; it participated in the vote and sought to add its counsel to the list of people being contacted; participated by teleconference in the counting of the ballots; and participated in further discussions – Only several days later, in post vote representations does the DCMA raise the issue of sovereign immunity – Given all this involvement by the DCMA, the Board was not prepared to accept that these actions were taken without the knowledge of the rights being waived – Having found that DCMA waived immunity, the Board went on to determine the "commercial activity" exception – The Board noted that the DCMA is "responsible in ensuring the integrity of contractual processes providing a broad range of contract procurement management services," and although it is weapons that are being purchased, the DCMA neither negotiates nor awards the contracts, but just monitors the implementation of the contracts – The Board was not convinced that sovereign activity was "insuring that you get what you bought, on time and for the negotiated price – which is what DCMA does" – The Board found that the connection was not too tenuous to create the requisite nexus for commercial activity to be brought into play, particularly when to hold otherwise would be to deprive Canadian workers, working on Canadian soil, the benefits of Canadian law; when American employees of DCMA are already represented in collective bargaining by a trade union and when the Commander in testimony acknowledged he could manage if the employees were engaged in collective bargaining – Accordingly the Board concluded that if DCMA has not waived its state immunity and attorned to the jurisdiction of the Board, then it is not immune pursuant to s. 5 of the *SIA* because these proceedings related to a commercial activity – Interim Certificate issued

BEFORE: *Bernard Fishbein*, Chair and Board Members *P. LeMay* and *C. Phillips*.

APPEARANCES: *Andrew Raven, Wassim Garzouzi* and *Adrian Dumitru* appearing for the applicant; *Malcolm Ruby, Jonathan Welch, Matt Blackston* and *Capt. W. Hayes* appearing for the responding party.

DECISION OF BERNARD FISHBEIN, CHAIR AND BOARD MEMBER C. PHILLIPS: August 31, 2012

1. This is an application for certification under the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended (the "Act").

2. The Board, differently constituted, issued a decision July 12, 2011 certifying the applicant ("PSAC") on an interim basis as the bargaining agent for certain employees of the responding party ("DCMA-Canada") pending resolution of certain bargaining unit description questions. That decision reflected the results of a representation vote conducted by the Board, in which the majority of the ballots cast were cast in favour of PSAC. That decision rejected DCMA-Canada's post-vote representations that the *State Immunity Act*, R.S.C. 1985, c. S-18 (the "*SIA*") immunized the DCMA-Canada from any Board proceedings. That decision rested in large part on the conclusion that the DCMA-Canada's participation in the Board's process (including the filing of the response) constituted waiver of any immunity it might have had otherwise. No decision was reached as to whether the DCMA-Canada's activities were properly characterized as "commercial", an explicit exemption to the *SIA* and therefore not falling within the protection conferred by the *SIA*.

3. The DCMA-Canada sought reconsideration of that July 12, 2011 decision. In a decision dated November 9, 2011 the Board rescinded its certification decision of July 12, 2011 and directed a hearing to hear the evidence of the parties with respect to the claim for sovereign immunity under the *SIA*.

4. Ultimately, that hearing took place on April 5, 2012 when the Board heard the testimony of Captain William P. Hayes, Commander of DCMA-Canada, and received certain exhibits and documents on the agreement of the parties. The applicant ("PSAC") chose to call no evidence. Rather than make oral argument on that date (or reschedule a hearing so that oral argument could be made), the parties preferred to make written submissions to the Board. We have now received and reviewed those written submissions and this is the decision of the Board.

Evidence

(a) Background – the DCMA-Canada

5. In its fact sheet published on the internet which was filed as an exhibit, the Defense Contract Management Agency ("DCMA") describes itself as "...a Department of Defence Combat Support Agency responsible for ensuring the integrity of contractual processes and providing a broad range of contract – procurement management services for America's war fighters..."

6. DCMA reports to the Undersecretary of Defence for Acquisition, Technology and Logistics of the United States Department of Defence (the "DoD"). Its headquarters is located in Fort Lee, Virginia and it has 50 contract management offices responsible for work performed in more than 740 locations worldwide.

7. Approximately 10,800 civilian and military professionals throughout the United States and 26 countries around the world execute DCMA's mission to provide customer-focused acquisition support and contract management services. The responding party – DCMA-Canada is a field contract management office of DCMA headquartered in Ottawa. The application relates to the 24 employees working for DCMA-Canada in Ottawa and London, Ontario. Captain Hayes has been the Commander of DCMA-Canada since September 2010.

8. Under a bilateral agreement dating back to February 1966, the Government of Canada provides (and pays for) DCMA-Canada's office facilities in Ottawa and covers related and overhead costs, including office furniture, telephones, and some office supplies. There is also an office in London, Ontario within the facilities of the General Dynamic Land Systems – Canada, a Canadian supplier to DoD.

9. Captain Hayes described DCMA's role as receiving a "contract delegation" from the DoD regarding the buying of products, primarily if not exclusively, weapons. In particular reference was made to Mine Resistant Ambush Protected combat vehicles ("MRAPs"), Tas Stryker Light Armoured Vehicles ("LAVs") and Expeditionary Fighting Vehicles (EFVs) used by NATO countries and, in particular, currently in Afghanistan.

10. DCMA does not negotiate these contracts – rather once the contracts have been concluded it provides contract administration services. Captain Hayes described the activities as involving up to 68 regulatory oversight functions.

11. Captain Hayes described the tasks and responsibilities of the affected employees of DCMA-Canada:

> Mission Support Group deals largely with human resources, budgeting and other administrative duties. These employees do not engage in any actual contract administration.
>
> Procurement technicians do a preliminary assessment of contracts when they are assigned to determine what type of monitoring activity should be undertaken and assign responsibilities to the appropriate people.
>
> Industrial Specialists – these workers are engaged in "surveillance" on suppliers to ensure that contracting entities have the capability of delivering products in accordance with the specified standards and on the due date and within a budget.
>
> Transportation group – these individuals are involved delivering final products from the supplier to the destination in the United States.
>
> Contract administrators – these workers supervise contracts as they are being completed to ensure that the products will be produced in accordance with the agreement on the due date.

12. In addition to the 24 Canadian citizens who are described by the DoD as "Locally Engaged Staff" ("LES"), there are American citizens who also work for the DCMA-Canada. Captain Hayes indicated that there were no differences in the nature of work performed in contract management administration between the American and the Canadian workers. The decision to staff a person by nationality is not driven by the nature of the work. It is noteworthy that the American nationals employed in Canada are covered by a collective agreement and represented by a bargaining agent, the American Federation of Government Employees ("AFGE"). Apparently the AFGE collective agreement has some restrictions including, primarily, restrictions on the right to strike.

13. DCMA-Canada contends that the Canadian employees are subject to strict security screening but Captain Hayes' evidence in regard to this was not particularly specific.

14. There are DoD guidelines that deal with the employment of LES and provides:

> "…prevailing practices, local laws, and customs shall be followed in the employment and administration of foreign nationals when the practices, laws, and customs are not in conflict with applicable U.S. law, applicable treaties, international agreements, or other higher level agreements and are compatible with the basic management and mission needs of U.S. forces".

In fact, the DoD policy makes specific reference to "collective bargaining" but in the context of agreements between the DoD and the host government about collective bargaining. There apparently are none in Canada. The DoD requires negotiators to seek "an explicit statement to the effect that foreign national employees do not have the right to strike against the U.S. forces" Apparently, at the DCMA offices in Germany, LES's are also covered by a collective agreement.

15. The DoD guidelines provide that the DCMA-Canada employees receive:

> "wages and benefits comparable to the employees of the Government of Canada, in the same locality and performing essentially the same work with relatively the same degree of responsibility. Salaries are based on rates in approved agreements between the Treasury Board of Canada and the Public Service Alliance of Canada for Canadian Civil Service Employees."

16. Canadian employees are paid in Canadian dollars, have Canadian taxes and CPP and EI premiums deducted at source. They also receive an annual contribution to each employee's RRSP account. Apparently, they receive health and disability benefits as well.

17. By DoD regulation, all purchases from Canadian suppliers valued at more than $100,000.00 are placed with the Canadian Commercial Corporation ("CCC"), a Canadian Crown corporation. However, it appears that the contract with Sun Life for health and disability benefits for the LES is directly between the DCMA-Canada and Sun Life. As well DCMA-Canada has entered into a contract with Dynamex to provide bonded drivers who pick-up mail in the United Stated and drive it to DCMA offices in Canada, as well as with Capital Door to provide general locksmith duties. DCMA-Canada also deals directly with the Treasury Board representatives to classify DCMA-Canada positions in a manner consistent with the Treasury Board classification system.

(b) The events with respect to the certification application

18. The application was delivered by facsimile transmission on Wednesday, June 15, 2011, a form of delivery permissible under the Board's Rules. It was to the attention of Captain Hayes as the "Commander". It made "no bones" about the business of the DCMA-Canada, stating in paragraph 5:

> "The Defense Contract Management Agency - Americas (Canada) is a branch of the Defense Contract Management Agency, which is responsible for performing contract administration services for the Department of Defense of the United States federal Government, in Canada".

19. The application was accompanied, as it must be in accordance with the Board's Rules, by the Board's Standard Notice to Employer of Application for Certification (Form C-1) with the names of the parties and the date inserted. The Board's pre-printed notice (Form C-1) contains the warning in paragraph 4:

> "Your response to the application must be filed with the Board no later than two (2) days after the Application for Certification was delivered to you".

20. The Notice also indicates in paragraph 6:

> "It is an offence punishable on summary conviction to fail to comply with a direction of the Board – see section 104 of the Labour Relations Act"

21. Apparently, Captain Hayes was in the United States on official duties when the application arrived. There is no dispute that he was made aware of the application by the Deputy Commander,

William Evans. In fact, Captain Hayes readily disclosed that he consulted with DCMA counsel in its headquarters in Fort Lee, Virginia, William Blackston.

22. After that consultation, a fully completed response was filed under the signature of Captain Hayes on June 16, 2011. Of note, in response to paragraph 1(c) of the response asking for a contact person for the responding party and which explicitly states:

> "Your contact person should be an individual with the authority to enter into agreements on your behalf"

Captain Hayes' name, telephone number and facsimile transmission and e-mail address and address were completed. Equally of note, paragraph 2 of the response clearly indicated that the responding party's business was as:

> "...an agency of the United States Department of Defense (DoD) established to perform contract administration services on behalf of the DoD, other U.S. federal agencies, foreign governments, international organizations, and others as authorized. DCMA Americas provides contract administration services for those contracts delegated to DCMA and which involve performance in Canada and other designated locations in South and Central America".

23. As well in its response, DCMA-Canada disagreed with PSAC's proposed bargaining unit and proposed a different bargaining unit. It provided particulars in support of that position as to why certain employees should be excluded:

> "The description provided by the applicant includes employees who exercise managerial functions or who are employed in a confidential capacity in matters relating to labour relations. These employees' duties, responsibilities and access to confidential information give rise to a conflict of interest with membership in a bargaining unit."

24. Moreover, in response to the question of whether there was any other trade union affected, DCMA-Canada indicated:

> "...Certain DCMA Americas employees who are citizens of the United States are members of other trade unions. These employees, however, are not affected by this application".

In the response, DCMA-Canada then went on to confirm voting arrangements (time, date and location of the polls – except proposing an alternative poll in London for security reasons) and specifically elected not to give notice under section 8.1 of the Act (i.e. did not challenge PSAC having sufficient membership evidence to entitle it to a representation vote). It also indicated scrutineers for DCMA-Canada at both poll locations and its agent for the counting of the ballots. Schedules "A" and "B" of employees were appropriately completed – including noting the two individuals whose inclusion in the proposed bargaining unit DCMA–Canada disputed. As well, a confirmation of posting was completed by William D. Evans, Deputy Commander confirming copies of the application and the Notice had been posted.

25. In essence, this was a thoughtful, reasoned and carefully completed response which staked out various positions in response to PSAC's application – obviously prepared with the assistance of counsel. It was not merely filing an appearance or the equivalent thereof.

26. The representation vote was held on June 22, 2011 (which date DCMA-Canada had agreed to) in its offices in Ottawa and in London, Ontario. That same day DCMA-Canada provided notice to all parties requesting that counsel for DCMA in Fort Lee, Virginia, Mr. Blackston, be added to the correspondence list between the parties.

27. On June 23, 2011, the ballots were counted at the Board's offices in Toronto and the results, which were in favour of the certification of PSAC, were announced. From the Certifications of the Conduct of the Election, it appears that DCMA–Canada participated by teleconference. It also appears from the certification worksheet that there were discussions at the same time with the Board's Labour Relations Officer to attempt to resolve all the outstanding issues in the certification application. DCMA-Canada participated by teleconference. Rather than agreeing to have a certificate issue to the PSAC, DCMA-Canada persisted in its position as it was entitled to do, that the bargaining unit description was inappropriate and two individuals should be excluded from the bargaining unit. At that point in time, it appeared that a hearing would be necessary to resolve these issues. The parties were provided five (5) business days to make post-vote representations.

28. Apparently, on June 27, 2011 a further teleconference between PSAC representative, Adrian Dumitru, Captain Hayes and Mr. Blackston took place. A discussion was held concerning the application and other issues.

29. On June 30, 2011, DCMA-Canada filed its post-vote representations. For the first time the issue of state (or sovereign) immunity was raised. Captain Hayes testified that until this point in time he was unaware that state immunity applied to the proceedings. Captain Hayes testified that he had no authority to waive state immunity. The decision to assert or waive sovereign immunity is the sole responsibility of the Attorney General of the United State, as delegated: See *28 United States Code Section 516.*

Discussion

(a) General

30. This case raises the issue of state or sovereign immunity (obviously an issue not regularly faced by the Board) and whether these proceedings can apply to DCMA-Canada.

31. DCMA-Canada refers us to, for the general purpose and effect of state immunity:

> "…the effect of sovereign immunity is that the host country recognizes the independence of every other sovereign state and declines to exercise by means of its courts any of its territorial jurisdiction over that sovereign or its property…" See *Jaffe v. Miller* (1993), 13 O.R. (3d) 745 (Ont. C.A.) at paragraph 12.
>
> "…state practice … generally established that domestic courts do not exercise jurisdiction in actions brought against foreign states" and "the general principle of sovereign immunity remains an important part of the international legal order..." See *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. Lebel J.

> "…founded on the concept of the sovereign equality of states and the non-interference of states in the internal affairs of each other" and "rooted in customary international law" See *Bouzari v. Iran* (2004), 71 O.R. (3d) 675 (Ont. C.A.).

32. We accept these general principles and do not understand PSAC to be quarrelling with them.

33. However, the question is how they apply to this case. There is now a statute that governs the issue in this country, the *State Immunity Act*, RSC 1985, c. S-18 ("*SIA*"). The relevant provisions for our purposes are:

> **2.** In this Act,
>
> "agency of a foreign state" means any legal entity that is an organ of the foreign state but that is separate from the foreign state;
>
> …
>
> "commercial activity" means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character;
>
> …
>
> "foreign state" includes
>
> (*a*) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,
>
> (*b*) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and
>
> (*c*) any political subdivision of the foreign state;
>
> **State immunity**
>
> **3.** (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.
>
> **Court to give effect to immunity**
>
> (2) In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings.
>
> **4.** (1) A foreign state is not immune from the jurisdiction of a court if the state waives the immunity conferred by subsection 3(1) by submitting to the jurisdiction of the court in accordance with subsection (2) or (4).
>
> **State submits to jurisdiction**

(2) In any proceedings before a court, a foreign state submits to the jurisdiction of the court where it

(*a*) explicitly submits to the jurisdiction of the court by written agreement or otherwise either before or after the proceedings commence;

(*b*) initiates the proceedings in the court; or

(*c*) intervenes or takes any step in the proceedings before the court.

Exception

(3) Paragraph (2)(*c*) does not apply to

(*a*) any intervention or step taken by a foreign state in proceedings before a court for the purpose of claiming immunity from the jurisdiction of the court; or

(*b*) any step taken by a foreign state in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained before the step was taken and immunity is claimed as soon as reasonably practicable after they are ascertained.

...

Commercial activity

5. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.

Appeal and review

9. (1) Service of an originating document on a foreign state, other than on an agency of the foreign state, may be made

(*a*) in any manner agreed on by the state;

(*b*) in accordance with any international Convention to which the state is a party; or

(*c*) in the manner provided in subsection (2).

(2) For the purposes of paragraph (1)(*c*), anyone wishing to serve an originating document on a foreign state may deliver a copy of the document, in person or by registered mail, to the Deputy Minister of Foreign Affairs or a person designated by him for the purpose, who shall transmit it to the foreign state.

Service on an agency of a foreign state

(3) Service of an originating document on an agency of a foreign state may be made

> *(a)* in any manner agreed on by the agency;
>
> *(b)* in accordance with any international Convention applicable to the agency; or
>
> *(c)* in accordance with any applicable rules of court.

34. Apparently, previously the common law was evolving with some uncertainty whether sovereign immunity was absolute or subject to increasingly imposed restrictive principles. That confusion has been described as "finally and definitively put to rest" in Canada by the *SIA*:

> "The SIA thus, continues the fundamental extension of immunity to a foreign sovereign at the same time as acknowledging that such immunity, in particular contexts is to be recognized in a restricted rather than an absolute fashion. Judicial review of the assertion of immunity has the advantage, particularly in a commercial context, of depoliticizing the assessment of the legal validity of the immunity claimed. Such considerations are reflected in the Act itself..." See *Jaffe et al. v. Miller et al., supra* at p. 10.

35. DCMA-Canada points to section 3 of the *SIA* as well as the decision of the Supreme Court of Canada, in *Kuwait Airways v. Iraq*, [2010] 2 SCR 571 at para. 22 as establishing:

> "Section 3 establishes a presumption of immunity from jurisdiction in legal proceedings against sovereign state... It is [the plaintiff] to establish that it may rely on an exception to this immunity..."

Again, we do not dispute this general principle – nor do we think PSAC quarrels with it.

36. The issues as framed by the parties are:

> (1) Has DCMA-Canada submitted (or attorned) to the jurisdiction of the OLRB as specifically contemplated by section 4 of the SIA?
>
> (2) Regardless of whether the DCMA-Canada has submitted or attorned to the jurisdiction of the Board, is the immunity of the SIA not conferred upon the DCMA because it is engaged in "commercial activity" as specifically contemplated by section 5 of the SIA?

(1) Has DCMA-Canada submitted or attorned to the jurisdiction of the Board?

(i) Is the Board a Court?

37. The *SIA* in section 3(1) states the foreign state's immunity from "any court in Canada". Obviously the Board is not a court. In *Re Canada Labour Code*, [1992] 2 SCR 50 (which case will be discussed further later in this decision), the Supreme Court of Canada held that pursuant to the terms of the *SIA*, the United States was immune from the jurisdiction of domestic labour tribunals – in that case, the Canada Labour Relations Board ("the CLRB") however conceded before the Supreme Court that it was a Court for purposes of the *SIA*. DCMA-Canada also points us to the decision in *Bentley v. Consulate General of Barbados/Invest Barbados*, 2010 HRTO 2258 (CanLII) for the conclusion that *SIA*

applies to administrative tribunals. In that case, the Vice-Chair of the Human Rights Tribunal of Ontario wrote:

> [18] Taking a purposive and contextual approach to the interpretation of the *SIA*, I find that immunity from the "jurisdiction of any court" in s. 3(1) of the *SIA* applies to proceedings before tribunals as well as the courts proper, including the Human Rights Tribunal of Ontario. This, in my view, is the interpretation which is in greatest harmony with the scheme and object of the *SIA* and the intention of Parliament.
>
> [19] Since the *SIA* codified the common law, its purpose is to recognize that, subject to certain exceptions, sovereign nations are independent from Canada and not subject to our laws or legal jurisdiction. Bearing the purpose of the *SIA* in mind, it becomes clear that whether laws are enforced and jurisdiction exercised through courts or administrative tribunals is irrelevant to the inquiry. Submission to the legal jurisdiction of Canada would offend the dignity of the foreign sovereign and undermine the concept of sovereign nations as independent equals no matter the forum – court or tribunal.
>
> [20] Moreover, to interpret the legislation otherwise – that is, to find that foreign states were immune to proceedings before the "courts" but not before "tribunals" – would frustrate the very purpose of the *SIA* and fly in the face of the common law doctrine of state immunity which it codified.
>
> [21] I am further fortified in my interpretation because it would be absurd to find that the respondents were subject to the jurisdiction of the Tribunal when they are clearly not subject to the jurisdiction of the Ontario Divisional Court, which judicially reviews the Tribunal's decisions, nor even indeed of the Supreme Court of Canada, the ultimate adjudicative authority in Canada. In addition to applications for judicial review, the Tribunal is also subject to the jurisdiction of the Divisional Court in that it may state a case to the Divisional Court on questions of law (s. 45.6 of the *Code*). Taking all of this into account, it would not make sense to interpret the *SIA* to mean that foreign state respondents are subject to the powers of the Tribunal but not of any of the superior courts to which the Tribunal itself is subject.

38. We accept that the *SIA* can also confer immunity before the Board pursuant to this reasoning. PSAC did not seriously dispute the notion that the *SIA* conferred immunity before an administrative tribunal or the Board.

(ii) Service – Foreign state vs. agency of a foreign state?

39. Section 9 of the *SIA* distinguishes how service can be made on a foreign state (section 9(1)) and how it may be made on the agency of a foreign state (section 9(3)). Specifically, only a foreign agency can be served:

> "(c) in accordance with any applicable rules of court."

40. There is no doubt that PSAC's application for certification was served on DCMA-Canada in accordance with the Board's Rules. However, if DCMA-Canada is a foreign state as opposed to an agency of a foreign state, that type of service is not permitted under the *SIA*. As a result, the parties made lengthy submissions about the nature of the DCMA-Canada and whether it was a foreign agency as opposed to merely part of the foreign state.

41. We are not sure if any of this matters. First, the ability to waive immunity under section 4 does not distinguish between nor turn on whether it is a foreign state (the highest status it can have) as opposed to a foreign agency – but whether it has waived the immunity. Second, if it has waived its immunity, that will be regardless of and include whether service was proper or not. Third, by the time the hearing occurred, it appeared that proper service had occurred (regardless of how calculated). DCMA-Canada had sought reconsideration (on August 10, 2011) of the initial decision of the Board (July 12, 2011). In the Board decision dated November 9, 2011, a hearing was directed to hear the submissions concerning the applicability of the *SIA* to the DCMA-Canada. The U.S. Department of Justice, Civil Division, Office of Litigation wrote to the Board on November 22, 2011 enclosing a diplomatic note sent by the United States Embassy to the Department of Foreign Affairs and International Trade on July 6, 2011 objecting to the manner in which the United States had been served – without at least 60 days before an appearance or a response is required. On January 31, 2012, the Board received a duly signed certificate from the Director of the Criminal Security and Diplomatic Law Division of Foreign Affairs International Trades of Canada certifying that pursuant to section 9(5) of the *SIA*:

> "the statement of claim pertaining to this action was transmitted to the appropriate authority of the government of the United States on January 30, 2012"

In order to avoid "entangling" this proceeding with further unnecessary process/service issues PSAC agreed to adjourn the hearing originally scheduling for March 6, 2012 to April 3, and then ultimately until April 5, 2012. In other words, 60 days notice before the hearing in which its submissions were received was eventually given.

42. If we are however, wrong about this conclusion, we would conclude that the DCMA is a foreign agency and not a foreign state and therefore, service in accordance with the Rules of the Board would be appropriate and in compliance with section 9 (3)(c) of the *SIA*.

43. First, to the extent that it is necessary, we agree with the submissions of PSAC that the *SIA* is a complete code which "suffers no intrusion" from the common law, international law or Canada's international treaty obligations. In particular, we refer to the decisions of Court of Appeal for Ontario in *Bouzari v. Iran, supra,* at para. 57:

> [57] In my view, the wording of the SIA must be taken as a complete answer to this argument. Section 3(1) could not be clearer. To reiterate, it says:
>
> 3. (1) **Except as provided by this Act**, a foreign state is immune from the jurisdiction of any court in Canada [Emphasis added].
>
> The plain and ordinary meaning of these words is that they codify the law of sovereign immunity…

44. As well, the Quebec Superior Court adopted this reasoning in *Bouzari* and concluded in *Kazemi (Estate of) v. Islamic Republic of Iran*, 2011 QCCS 196:

> "Consequently, the SIA contains all of the legal rules and principles which may be involved to decide whether immunity should, or not, be granted to a foreign state. The SIA is a complete statute which suffers no intrusion from a common law, international law or Canada's international treaty obligations."

That was also approved in *Steen v. Islamic Republic of Iran*, 2011 ONSC 6464 (See paragraphs 48 to 50).

45. Accordingly, the common law rules with respect to service and the cases in support thereof that DCMA-Canada relies upon (and to the extent that they are at all even applicable) are of no assistance to us.

46. Both PSAC and DCMA-Canada referred us to a number of cases in support of their respective positions on whether DCMA-Canada was a foreign agency as opposed to a part of the state.

47. DCMA-Canada referred us to *Tritt* v. *United States of America.*, [1989] 68 O.R. (2d) 284 where the "Organized Crimes Strike Force" of the U.S. Department of Justice was found to be a part of the U.S. government and not an agency thereof and *Ferguson v. Arctic Transportation Ltd.*, [1995] 3 F.C. 656 ("F.C.T.D."), where the court concluded that the Panama Canal Commission was "part of" the U.S. government because it was not sufficiently "separate from" the government. As well, DCMA-Canada referred us to an American decision in *Transaero Inc. v. La Fuerza Aerea Boliviana*, 30 F. 3d 148 (D.C. Cir. 1994) where a majority of the Circuit court of the District of Columbia considered similar provisions of the *U.S. Foreign Sovereign Immunities Act* and concluded that an entity's "governmental" as opposed to its "commercial attributes", distinguished an agency of the foreign state from the foreign state itself:

> "The question, then, is whether the core functions of the armed forces of a foreign sovereign are governmental or commercial. We hold that the armed forces are as a rule so closely bound up with structure of the state that they must in all cases be considered as the "foreign state" itself, rather than a separate "agency or instrumentality of state of the state". The "powers to declare and wage war" are among the necessary concomitants of sovereignty"

48. PSAC, on the other hand, refers us to other jurisprudence. Prior to the enactment of the *SIA*, the common law was prepared to extend the grant of sovereign immunity not just to governments but also to "its department of state or any body which can be regarded as an alter-ego or organ of the government". PSAC refers us to the decision in *Ferranti-Packard Ltd. v. Cushman Rentals Ltd. et al*, (1980), 30 O.R. (2d) 194, at para. 23; aff'd 31 O.R. (2d) 799 (Ont. Ct. Appeal) where the New York State Thruway Authority was found not to be the "alter-ego" of the State of New York and therefore could not avail itself of state immunity. In *Ferranti-Packard Ltd.*, *supra*, the court indicated there was no clear test for whether an entity was the "alter-ego" of the state but relied on the comments of Lord Denning in *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 at 560:

> I confess that I can think of no satisfactory test except that of looking to the functions and control of the organization. I do not think it should depend on foreign law alone. I would look to all the evidence to see whether the organization was under government control and exercised government functions.

49. Since the *SIA* now includes the definition:

> "Agency of the Foreign State" means any legal entity that is an organ of the foreign state but is separate from the foreign state

it seems fair to suggest that the definition of foreign agency may be more elastic now than strictly not being the "alter-ego" of the state.

50. Moreover, as PSAC fairly points out at this juncture the issue is not whether DCMA-Canada warrants state immunity as a result of its status but rather, whether it is the foreign state or an agency for purposes of service. As a result, in our view, cases prior to the *SIA*, cited by both parties, on this issue need to be looked at with some greater degree of perspective as the consequences are not the determination of immunity but merely whether service was proper.

51. PSAC points us to the recent decision in *Collavino Inc. v. Yemen (Tihama Development Authority)*, 2007 ABQB 212, at para. 116 where the court dealt with whether the Tihama Development Authority ("TDA") was an agency of Yemen as opposed to Yemen itself. Although, board members of TDA were appointed by the Government of Yemen, final approval of TDA's budget was approved by Parliament, the seal and letter of TDA made reference to the Ministry of Agriculture and Water Resources of Yemen and legal counsel for TDA was appointed by Yemen, the court still concluded that the TDA was a foreign agency within the meaning of the *SIA*.

52. Furthermore, PSAC distinguishes the cases that DCMA-Canada relies on and in particular *Ferguson v. Arctic Transportation, supra,* where the fact that the Panama Canal Commission had no general right to sue or be sued appeared to be an important part of the court's decision. That test, namely, the right to sue, PSAC says, in recent jurisprudence is not considered to be conclusive on whether a "legal entity is an organ of the foreign state but is separate from the foreign state". See *Croteau v. United States of America (Federal Trade Commission)*, [2006] O.J. No. 158 (Ont. Ct. Appeal) at para. 5.

53. In the end, we are persuaded by what the DCMA-Canada says about itself, in its own website and which was obviously prepared previously and not for purposes of any argument in this litigation. Not only does it engage 10,294 civilian personnel in over 50 offices, not only does it refer to itself as an agency, but DCMA describes its own history which is worthy of quoting:

> "Defense analysts have studied and modified performance of contract administration services within the Department of Defense for many years. In the early 1960s, the Secretary of Defense commissioned a study to examine the entire DoD contracting process. Known as Project 60, the findings pointed to numerous benefits to consolidating contract administration functions. At that time, each agency and military service performed its own contract administration, resulting in substantial duplication of efforts. Many contract administration responsibilities were eventually moved to the Defense Logistics Agency. However, military services continued to retain oversight of major acquisition programs.
>
> The Secretary of Defense reviewed the CAS process again in 1989. Citing continued problems with the manner in which the services were performing CAS, *Defense Management Review Decision 916* recommended the establishment of a joint command to perform CAS to

> ensure that consistent policies and standards were applied to the acquisition process. The Defense Contract Management Command was established within DLA in February 1990 to satisfy the findings of *DMRD* 916.
>
> On March 27, 2000, the DoD renamed DCMC as the Defense Contract Management Agency and established it ***independently*** from DLA. DoD Directive 5105.64, signed Sept. 27, 2000, formally established DCMA's purpose and mission and, except for specific exceptions detailed in the Defense Federal Acquisition Regulation Supplement, required all DoD contract administration functions to be delegated to DCMA."
> (emphasis added)

54. The definition of an agency of a foreign state in the *SIA* is an organ of the foreign state that is separate from the foreign state. The cases and the factual context here do not offer a bright line test for that. Although, obviously, DCMA-Canada answers to the DoD and the government of the United States (which agency of a foreign state that is still an organ of the foreign state would not?), it appears from the history of the DCMA-Canada that some effort has been made to distance it at least to some extent from the DoD and the other agencies within the DoD. In its response submissions (for the first time) DCMA – Canada pointed us to the provisions of the *United States Code* and the U.S. statutory framework that allows a "defense agency" to be created as part of the DoD (and again to the U.S. jurisprudence in *Transaero, supra*). Leaving aside our reluctance to determine immunity from Canadian law solely on the basis of foreign statutes, we are also reluctant to conclude (bearing in mind that we are discussing here only the mode of service not immunity itself) complete independence (whether *de facto* or *de jure*) from the state is required to be an agency of a foreign state – because then it is difficult to comprehend how that agency could still be an "organ" of the foreign state. Accordingly in these circumstances, we are prepared to find that the DCMA-Canada is an agency of the foreign state and that the service was properly made on it pursuant to section 9(3)(c) of the *SIA*.

55. Again, we do not wish to overstate the significance of this finding. In our view, if, as previously noted above in paragraph 41, if the DCMA-Canada has attorned to the jurisdiction of the Board it would have attorned to the jurisdiction of the Board even if the service was improper. In other words, attorning to the jurisdiction would over come even a defect in service in our view. Moreover, and in any event, if service was required pursuant to section 9(1) or (2) of the *SIA*, ultimately that service was effected.

(iii) Whether DCMA-Canada did attorn to the jurisdiction of the Board?

56. DCMA-Canada asserts that it has not waived its immunity. It points us to the decision in *United States of America v. Friedland*, (1999), 182 D.L.R. (4th) 614 (Ont. Ct. Appeal) for the proposition that "any waiver of immunity must be clear and unequivocal; and cannot be presumed". It points us to decisions in *PSAC v. United States Defense Department*, [1988] 74 di 191 (C.L.R.B.) where the "ambiguous and imprecise nature" of the NATO treaty provisions that the United States had entered into (to the effect that certain civilian labour requirements be governed by Canadian law) was insufficient to constitute an explicit waiver within the meaning of Section 4(2)(a) of the *SIA*. Equally, it refers us to the recent decision in *UFCW Local 1518 and the United Mexican States et al.*, B.C.L.R.B. No. B28/212 (February 2012) in which the British Columbia Labour Relations Board found that the Government of Mexico by entering into the Seasonal Agricultural Workers Program with the Government of Canada, which contained the provision that it was subject to the Laws of Canada and British Columbia, also did

not amount to waiver of Mexico's state immunity but rather was simply meant to apply to the individual contracts of employment between Mexican workers and their employers.

57. As well, DCMA-Canada argues that sovereign immunity is not waived unless made by those with actual authority and full knowledge of the right waived and refers us to a number of English common law cases that it asserts stand for that proposition. See *The Jassy*, [1906] Probate 270; *Re Republic of Bolivia Explorations Syndicate Ltd*, [1914] 1 Ch. 139; *Baccus S.R.L. v. Servicio Nacional Del Trigo*, [1957] 1 Q.B. 438 (C.A.); *R v. Madan*, [1961] 2 Q.B. 1 (C.A.). Whether these cases actually establish a fair or reasonable standard for whether sovereign immunity is waived (and in our view it may be indefensibly high), leaving aside that they all appear to be readily distinguishable on their facts, we are of the view that they are of little assistance to us. They are not cases decided under the *SIA* and for all of the reasons previously referred to (and the authorities supporting that conclusion), we are of the view that the *SIA* is now a complete Canadian code of the law of immunity including whether it has been waived.

58. In fact the only case that DCMA-Canada referred us to (it was also referred to us by PSAC) that directly deals with Section 4(2)(c) of the *SIA* – whether the entity claiming immunity had actually intervened or taken any steps in the proceeding before the court – was *Smith v. Chin* [2006] O.J. No. 4091. Although the Court did observe at paragraph 22:

> "The filing of the defence is a step in the proceeding; however while problematic for the moving party defendants, perhaps in itself this should not be fatal to their seeking immunity…"

and further in paragraph 33:

> "A court must allow some latitude to achieve fairness and reasonableness, and to achieve a result consistent with the underlying policy of the *Act* in determining whether a foreign state has submitted to its jurisdiction by taking "a step in the proceedings before the court…"

ultimately it concluded that immunity had been waived. The court stated at paragraph 34:

> The onus is upon the foreign state to bring itself within the very exceptional relief of granting immunity from prosecution in a civil action. **The moving party defendants have arguably taken steps without realizing the jeopardy to state immunity otherwise afforded by the Act.** They now seek to disown the step taken to seek summary judgment on the merits.
> (emphasis added)

In that case the court found that (at paragraph 35):

> "… a motion for summary judgment on the merits, cross–examination of the plaintiff on his responding affidavit in respect of the merits and maintaining a statement of defence on the merits, coupled with the extensive written submissions in the moving party defendants' facta that there is no grievance issue for trial…."

were more than enough to waive immunity. Not only does this appear to belie DCMA-Canada's argument that since Captain Hayes testified (and was not contradicted) that he was unaware of the state

immunity of DCMA-Canada, therefore it was impossible for him to knowingly waive it, it should also be noted that this conclusion was still reached in *Chin, supra,* in spite of the fact that the question of state immunity appears to have been raised from the outset in *Chin, supra,* (unlike here) both in the statement of defence and the motion and facta referred to (albeit together with many other issues).

59. Moreover, the *SIA* seems to specifically contemplate a standard not as high as DCMA-Canada advocates. Section 4(3)(b) of the *SIA* explicitly excludes section 4(2)(c) from applying to any:

> "step taken by a foreign state in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained before the step was taken".

In other words, it appears that an entity entitled to immunity that unknowingly takes a step in a proceeding can only escape having attorned to the authority of the court if the facts "could not reasonably have been ascertained".

(iv) So what happened here?

60. (a) PSAC served its application for certification not just on anybody at the DCMA-Canada but on the Commander – the very person that the DCMA-Canada listed in its response as "an individual with the authority to enter into agreements on your behalf" – and ironically the very same person who eventually first asserted state immunity on its behalf weeks later;

(b) the Commander, although away out of the country, was immediately informed of the application. He did not foolishly or irresponsibly just complete the Board's response form. Rather, the Commander consulted with counsel, not local counsel who might be unaware of the nature of the DCMA or the scope of its operations – but DCMA's own counsel in its headquarters in Fort Lee, Virginia;

(c) a response was filed over the signature of the Commander. The response does not merely "enter an appearance" to the proceeding but deliberately and specifically raised substantive issues in opposition to the application for certification:

> (i) it explicitly elected not to challenge PSAC's entitlement to a vote under section 8(1) of the Act (as it was entitled to do);
>
> (ii) it disagreed with the bargaining unit proposed by PSAC and asserted a different bargaining unit;
>
> (iii) it explicitly acknowledged that it is an agency of the United States Department of Defence to perform contract administration services on behalf of the DoD, other U.S. federal agencies, foreign governments and international organizations;
>
> (iv) it agreed to a representation vote within five (5) days (when it could have opposed that request not only on the basis of state immunity but on any other basis it sought to advance);

(v) it agreed to the representation vote being conducted in its offices in Ottawa but proposed another location for the representation vote in London;

(vi) it proposed individuals as scrutineers for the representation votes and an agent to represent it at the counting of the ballots; and

(vii) it filed schedules of employees and specifically challenged the inclusion of at least two employees that PSAC wished to include.

(d) it then participated in the representation vote on the date and at the locations it had agreed to;

(e) it sought to have its counsel in its headquarters, Fort Lee, Virginia (with whom the Commander had reviewed the application) added to the list of people to be contacted with respect to the application;

(f) it then participated, if only by telephone conference call, in the counting of the ballots and the discussions with the Labour Relations Officer to attempt to resolve the certification application without any hearing. DCMA-Canada maintained its position on the issues it disputed, asserting that they could not be resolved and must go to the Board for hearing; and

(g) it then participated in a further discussion with its counsel and a representative of PSAC to see if the issues could yet be resolved.

All of this was done without once raising the issue of state immunity. Only several days later in its post vote representations, signed by the Commander, does it for the first time raise the question of sovereign immunity.

61. DCMA-Canada argues that none of this involves an intentional or involuntary waiver of immunity, was made without authority and was made without knowledge of the rights being waived. Simply put, we are not prepared to come to such a conclusion when what has happened are the actions of the Commander of DCMA-Canada and after the Commander has consulted with counsel – not just local or inexperienced counsel but counsel for DCMA in its headquarters which oversees 50 contract management offices responsible for work performed **in more than 740 locations worldwide and in 26 countries around the world** – at least according to the DCMA website. To the extent that section 4(3) of the *SIA* is prepared to excuse the taking of any step in ignorance of facts entitling the entity to immunity, it is only "if those facts could not reasonably have been ascertained before the step was taken". For an agency that proudly operates so extensively internationally and proclaims on its website that its:

> "…mission is to "provide customer-focused acquisition support and contract management services to ensure **worldwide** warfighter readiness, 24 hours a day, 7 days a week"
> (emphasis added)

we are not prepared to conclude that the facts for such a fundamental assertion as state or sovereign immunity could not reasonably have been ascertained in these circumstances.

(2) The Commercial Activity Exception

62. Even if DCMA-Canada has not waived its immunity, PSAC argues that the exception in Section 5 of the *SIA* applies:

> "A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state."

63. Not surprisingly DCMA-Canada disagrees. In the event we are incorrect in finding that DCMA-Canada has waived its immunity, we deal with this issue now.

64. We start this analysis with perhaps the obvious – the exception in section 5 cannot apply unless we already accept DCMA-Canada has state or sovereign immunity. In other words, even if DCMA-Canada has immunity, is what DCMA-Canada doing relate to "commercial activity of the foreign state"?

65. Both parties refer us to the Supreme Court of Canada decision in *Re Canada Labour Code*, supra. In that case PSAC had brought proceedings before the CLRB to certify a bargaining unit of civilian employees working for the United States Navy at its base in Argentia, Newfoundland which had been established pursuant to a World War II agreement. Ultimately in a 3–2 majority decision, the Supreme Court of Canada held that the *SIA* conferred immunity (and from the CLRB certification proceedings) and the commercial activity exception in section 5 of the *SIA* did not apply.

66. Not surprisingly, DCMA-Canada asserts that the *Re Canada Labour Code* decision bears a striking resemblance to the circumstances here – the Commander of the civilian employees at the base was a military officer, the employees were paid in Canadian dollars and Canadian taxes, pension and unemployment insurance premiums were deducted at source.

67. The majority held that the commercial activity exception in the *SIA* required a two step inquiry: the nature of the activity must be determined, then its relationship to the domestic court proceedings must be assessed. Although, the majority was prepared to concede that the bare contract of employment at the base is for the most part commercial activity and the Canadian employees will generally be entitled to enforce their contracts in Canadian courts, the majority held that employment at the base had sovereign aspects as well. In particular, the structuring of work at the base, traditionally a management prerogative, was reserved for the base commander. In their view, the aspect of employment went to the heart of the base operations, and as such was sovereign in nature. As well, the majority held to fall under the commercial activity exception, the proceedings must do more than incidentally affect the hiring of civilian labour at the base. While the certification proceedings touched on the employment contracts the majority was of the view that the connection of the hiring of individual employees and the imposition of non–consensual labour–management relations under the *Canada Labour Code* was too tenuous to commercial activity to create the nexus required by the *SIA* to fall within the exception – however the potential of supervision of base operations by a domestic tribunal did create a nexus to the governmental activity of running a naval base that was unacceptable under the Act. In the majority's view that the granting of sovereign immunity worked to deprive employees of their rights to the protection of labour relations law was a necessary consequence of Canada's commitment to policies of international comity and reciprocity – whenever sovereign immunity is asserted it is inevitable that the domestic parties will be denied legal recourse. That was the whole point of the Act.

68. The minority took a different view – the goal was to reasonably restrict state immunity by looking beyond the ultimate purpose of the foreign state's action, which will almost always be public, while continuing to protect by immunity the truly sovereign acts of states from domestic court proceedings. In the minority's view, the issue of whether or not immunity ought to be granted depends on (1) the tasks for which the workers were hired, and, (2) whether the activity of hiring a person to perform that task was one in which a private party could engage. The workers were trades persons hired as support workers for the military personnel. The hiring of workers for the base did not fall within the scope of public acts of sovereign states. The state may not rely on the ultimate purpose of an activity to qualify its acts. Since the employment of maintenance workers was an activity in which private parties could engage, the hiring of such workers must fall in the category of private act which by its nature is a commercial activity. Canadian workers, working on Canadian soil should not be deprived the benefits of Canadian law unless the foreign state is acting in a context which warrants immunity.

69. As persuasive as we may find the reasoning of the minority, we are bound by the law as we find it. Having said that, as PSAC points out, central to the majority's ruling appears to be that what was involved was employment at a military base. In particular, in words of LaForest J. for the majority at paras. 48 and 50:

> "what is primarily at issue here is the broader employment structure of the base. What the Board is seeking to do is assert its jurisdiction and regulatory control over labour relations on the base and I agree with counsel for the Attorney General of Canada that there is too tenuous connections between the U.S. Navy's entry in the local labour market for the purpose of hiring individual employees and non-consensual labour management relations imposed under the *Canada Labour Code* to create the requisite nexus for commercial activity to be brought into play in this case…
>
> Collective bargaining carries with it the right of employees to strike to enforce their contract demands. A strike at the Argentia base would, at a minimum, disrupt its military mission. It is true that the employees' services are not directly required to achieve this mission. However, the indirect effect of the loss of 60 full-time employees cannot be lightly dismissed. I am not prepared to concede that a boiler plant operator or an engineer at the base does not contribute in some important way to the successful operation of the base. In oral argument, PSAC submitted that the military could fly in additional military personnel to replace the striking workers. This may be a feasible solution in peace time, but in a war every day of down time at the base would be critical. Simply put, the United States is entitled to absolute control of the base and so over the availability of its labour force, particularly in times of war. At all events, it can hardly be said not to interfere seriously with the control of the base, which is expressly conferred upon the United States by the Lease."

70. However, even taking all of this into account, the actual operation of a naval base is still significantly different than a contract administration agency even if it is for the U.S. DoD and even if it is administering contracts for the purchase of weapons. Such a distinction has been recognized in *Gilligan (Re)*, [1998] O.E.S.A.D. No. 5 para. 31 where state immunity was refused to the Swedish Trade Council:

> "[…] The *Re Canada Labour Code* case is completely distinguishable on the facts. It is not difficult to characterize the operation of a foreign

> naval base as a sovereign activity; nor is it difficult to see why the Court found that a collective bargaining regime would intrude upon the operation of that base. It is, however, an entirely different matter to suggest that the Swedish Trade Council, which admittedly was an agency of the Swedish state, was engaged in sovereign rather than commercial activity. The mandate of the Swedish Trade Counsel was entirely devoted to encouraging and facilitating the commercial activities of Swedish companies. There is nothing in the evidence which suggests any other role. And while it is arguable that this activity, in itself, has a sovereign aspect, I have no hesitation in finding that it is insufficient to attract a doctrine of state immunity..."

Again, we recognize DCMA-Canada performs its functions for the DoD, but the DCMA neither negotiates nor awards the contracts which are given to private (and commercial) suppliers – all of which, in our view, would be arguably more sovereign activity. The DCMA, in its own words, is "responsible in ensuring the integrity of contractual processes providing a broad range of contract procurement management services". Again, without diminishing the fact that what is being purchased are weapons (neither selected not awarded by DCMA), to conclude that this, just like the actual operation of a naval base, is so intertwined with the sovereign aspects as to override the commercial aspects, is, in our view, to conclude virtually anything purchased by the DoD (whether it be uniforms, food, or clerical supplies) from private suppliers in Canada will be primarily sovereign not commercial activity – to say nothing of the fact that what we are talking about is neither the negotiating, nor awarding of those contracts but just the monitoring of those contracts.

71. In fact, DCMA-Canada argues that because it is not the buyer, does not negotiate the price, nor enter into the basic contractual management, its activities are arguably even more sovereign than the activities of the support employees in maintaining a military base in *Re Canada Labour Code*. According to DCMA-Canada:

> The essential purpose of the DCMA's activities is ensuring that equipment used in, or purchased in preparation for, a foreign sovereign's military and combat operations meets contractual standards associated with costs, quality, schedule and overall performance"

or in other words, ensuring:

> "....they meet a foreign state's standards for foreign combat, which is quintessentially a sovereign activity."

We are not persuaded. Although laden with sovereign–like terminology – wars, weapons, combat – "bottom line", in our view, the sovereign function is the conduct of war, the method or methods to do so (including "setting the standards for foreign combat" which may encompass either negotiating or awarding the contracts) – arguably none of which DCMA-Canada does. It is far more problematic for us to conclude that the sovereign activity is insuring that you get what you bought, on time and for the negotiated price – which is what DCMA-Canada does. The difficulty with DCMA-Canada's argument is that it would equally apply if the U.S. Department of State had an agency that hired Canadians to insure that suits made in Canada for its diplomats ("quintessentially a sovereign activity") were well tailored – which, in our view, simply pushes the narrow majority Supreme Court decision in *Re Canada Labour Code* further than it need go.

72. In our view, the majority view in *Re Canada Labour Code* need not be extended or pushed that far. Using the words of LaForest J., in *Re Canada Labour Code*, we do not think that there is:

> "too tenuous a connection... to create the requisite nexus for commercial activity to be brought into play in this case".

In this case we think the facts are more closely aligned with the persuasive approach of the minority in *Re Canada Labour Code*, particularly, when to hold otherwise would be to deprive Canadian workers, working on Canadian soil, the benefits of Canadian law. This conclusion, in our view, is only more pointed when the fact is that the American employees of DCMA-Canada are already represented in collective bargaining by a trade union. In fact, when asked during his testimony if he could still manage in accordance with established policies if DCMA-Canada's employees were organized and engaged in collective bargaining, Captain Hayes candidly agreed that he could and it has been done in other situations.

73. Indeed, as PSAC points out to us, there is some irony in the fact that courts in the United States have held that foreign states are not entitled to immunity from proceedings before the National Labour Relations Board. In *Goethe House New York v. National Labor Relations Board*, 869 F. 2nd 75; 1989, the United States Court of Appeals for the Second Circuit concluded that collective bargaining, especially in situations where some employees were already unionized, did not engage state immunity:

> "[*79] To justify its assertion of jurisdiction, the district court wrote that requiring Goethe House to submit to NLRB jurisdiction might interfere with the West German government's "employment objectives in implementing cultural foreign policy" and might cause disturbances and embarrassment in international relations. In our view, the district court's concerns were largely unfounded and did not warrant the court's intervention in the case. Even if the Union were certified as the bargaining agent of Goethe House's non-German employees, we fail to see how the presence of the Union would interfere with Goethe House's implementation of West German cultural foreign policy. Under the NLRA, Goethe House would have a duty to bargain with the Union over [**12] wages, hours and other terms and conditions of employment. See *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 674, 69 L.Ed.2d 318, 101 S. Ct. 2573 (1981); 29 U.S.C. § 158(d) (1982). Goethe House would have no duty to bargain over how it performed its mission of promoting German culture. See *Local 777, Democratic Union Organizing Comm. v NLRB*, 195 U.S App. D.C 280, 603 F.2d 862, 883 (D.C.Cir.1978) (employer need not bargain over issues fundamental to the basic direction of the enterprise). Moreover, the fact that the German employees at Goethe House presently are unionized belies the prospect that the presence of a union for the non-German employees would hamper Goethe House's operations.
>
> While it is true that the Union might interfere with the West German government's "employment objectives," in the sense that it might deprive that government of the power to unilaterally determine working conditions for Goethe House's non-German employees, we do not believe this loss of unilateral control constitutes a "uniquely compelling justification," 372 U.S. at 17, for the district court to assert jurisdiction, [**13] especially since the West German government does not exercise

> unilateral control over employment conditions for Goethe House's German employees.
>
> We also fail to see how the Board's assertion of jurisdiction would cause disturbances and embarrassment in international relations. In its opinion, the district court did not explain how such disturbances might occur. However, during oral argument, Judge Owen alluded to the possibility that Goethe House's non-German employees might "go on strike ... [and] carry signs saying the German government is unfair to American workers." Assuming *arguendo* that such a display occurs and results in embarrassment to the West German government, it would be the assertion of the right to strike and picket by Goethe House's non-German employees, and not the Board's assertion of jurisdiction over Goethe House, which would account for the situation."

74. Accordingly, we conclude that even if DCMA-Canada has not waived its state immunity and attorned to the jurisdiction of the Board, it is not immune from the jurisdiction of the Board, pursuant to section 5 of the *SIA* because these proceedings relate to the commercial activity of DCMA-Canada.

Conclusion

75. Accordingly, as the Board determined in its initial decision on July 12, 2011, pursuant to the Board's discretion under section 9(2) of the Act, and pending the final resolution of the composition of the bargaining unit, the Board certifies PSAC as the bargaining agent for all employees of Defence Contract Management Agency - America (Canada) employed in the City of Ottawa and City of London save and except Deputy Commander and persons above the rank of Deputy Commander; employees in the bargaining unit for which any trade union held bargaining rights as of June 5, 2011 and pending the resolution of the status of these categories, excluding as well the Human Resource Management, Analyst/Executive Support and Mission Support Group Chief.

76. The final certificate must await the final determination of the appropriate bargaining unit.

77. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days of the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

78. Either of the parties may request the Board to determine the composition of the bargaining unit if the parties cannot resolve that matter. If the parties have reached agreement on the composition of the bargaining unit, either party may request the Board to issue a final certificate in respect of the agreed upon bargaining unit. If within one year of the date of this decision, the Board has not been requested to issue a final certificate or determine the outcome of the composition of the bargaining unit and the parties have not entered into a collective agreement, this decision shall be deemed to constitute a certification of PSAC pursuant to section 10 of the Act and the certificate issued by the Board and the bargaining unit described in paragraph 75 above shall be deemed to be the Board's final determination of the bargaining unit.

3052-11-G; 3808-11-JD Universal Workers Union, L.I.U.N.A. Local 183, Applicant v. **Dineen Construction Limited**, Responding Party.; Dineen Construction Limited, Applicant v. Universal Workers Union, Labourers' International Union of North America, Local 183, International Brotherhood of Painters and Allied Trades, District Council 46, Monalt Environmental Inc., Responding Parties.

Construction industry Grievance – Jurisdictional Dispute – Practice and Procedure – Reconsideration – The Labourers sought reconsideration of a Board decision deferring the adjudication of a grievance pending the outcome of a jurisdictional dispute, arguing that the grievance relating to the sub-contracted work was insufficient to trigger a jurisdictional dispute, or insufficient to allow the jurisdictional dispute to take primacy over the grievance referral and cause it to be deferred – The Board held that its longstanding jurisprudence clearly suggests that a multi-party dispute is much more efficiently and effectively addressed through the jurisdictional dispute process – The Labourers will not be deprived of their collective agreement argument when the underlying issue of the jurisdictional dispute is heard – Reconsideration denied; briefs ordered

BEFORE: *Bernard Fishbein*, Chair.

APPEARANCES: *Stephen Krashinsky* and *Michael Russo* appearing for Universal Workers Union, L.I.U.N.A. Local 183; *Jim McKeown*, *Tom Howell* appearing for Dineen Construction Limited; *Jesse Nyman* and *Juan Lopez* appearing for International Brotherhood of Painters and Allied Trades, District Council 46.

DECISION OF THE BOARD: July 23, 2012

1. Board File No. 3052-11-G is a referral of a grievance to arbitration ("the grievance referral") pursuant to section 133 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). Board File No. 3808-11-JD is a related notice of jurisdictional dispute under section 99 of the Act ("the jurisdictional dispute").

2. By decision dated March 5, 2012 the Board adjourned the grievance referral *sine die* pending the determination or resolution in the jurisdictional dispute. Counsel for Universal Workers Union, Labourers' International Union of North America, Local 183 ("the Labourers") immediately sought reconsideration of that decision because, *inter alia*, it was made without soliciting submissions from the parties, and in particular, the Labourers who opposed the adjourning of the grievance referral pending the determination of the jurisdictional dispute. As a result, the reconsideration request was listed for hearing (together with the pre-hearing consultation in the jurisdictional dispute) to give the parties the opportunity to make submissions on the deferral of the grievance pending the outcome in the jurisdictional dispute. A hearing was held with respect to both of those matters on July 4, 2012.

3. The Labourers submit that this is not a situation where its grievance referral ought to be deferred in order for the jurisdictional dispute to proceed. The Labourers' grievance is against Dineen Construction Limited ("Dineen") for violating the collective agreement binding upon Dineen and the Labourers by subcontracting work to Monalt Environmental Inc. ("Monalt") (which is not bound to any collective agreement with the Labourers) at the Lakeridge Health Centre in Oshawa, in particular, the removal of vinyl asbestos floor tiles. Monalt is bound to a collective agreement with the International Union of Painters and Allied Trades ("the Painters"). Not surprisingly, the work was performed by

members of the Painters pursuant to their collective agreement. There is no dispute that the Painters have no collective agreement with Dineen.

4. The position of the Labourers is relatively straightforward. Dineen is bound to a collective agreement with it that restricts its ability to subcontract, and particularly to Monalt. Dineen has no collective agreement or relationship with the Painters. This is not a case where Dineen is bound to different collective agreements and with competing trade unions with competing demands for the work, which the Labourers describe as a "typical" or "true" or "real" jurisdictional dispute. As the Labourers put it, but for Dineen's violation of its collective agreement with it (the only collective agreement applicable here), there would be no jurisdictional dispute. In the circumstances this is a collective agreement matter and ought not to be deferred, clouded or confused with a jurisdictional dispute. Otherwise Dineen, in the Labourers' view, is free to violate its subcontracting obligations and then hide behind a jurisdictional dispute that it initiates.

5. The Labourers point me to the decisions of the Board in *Sarnia Wolverine Manufacturing Ltd.*, [1994] OLRB Rep. January 68; *Bruce Power LP*, 2009 CanLII 37604 ON LRB; *Ontario Power Generation Inc.*, [2002] OLRB Rep. Nov/Dec 1139; *Robertson Yates Corporation Limited*, [1992] OLRB Rep. April 507; *Pre-Con Company, a Division of St. Mary's Cement Limited*, [1981] OLRB Rep. July 947; *VicWest Steel Limited*, [1991] OLRB Rep. January 111 and *Schindler Elevator Corporation*, [1990] OLRB Rep. October 1092.

6. Initially, there is an attraction to the simple argument of the Labourers. Unfortunately, it hearkens back to an earlier day when the Board's jurisprudence concerning triggering a jurisdictional dispute and what was required and who was the employer was somewhat arcane. The jurisprudence has evolved greatly since then. Essentially what the Labourers ask me to do is find that a subcontracting grievance against the general contractor (bound to no competing collective agreements) is insufficient to trigger a jurisdictional dispute, or, insufficient to allow the jurisdictional dispute to take primacy over the grievance referral and cause it to be deferred. The overwhelming current Board jurisprudence and Board practice is to the contrary.

7. The difficulty with the Labourers' analysis is that it pits its collective agreement rights against all other rights and says its collective agreement rights should prevail. It is not really a question of the Labourers' collective agreement rights being ignored but really a question of which of two different statutory processes, the grievance referral under section 133 of the Act, or jurisdictional dispute mechanism under section 99 of the Act, is most appropriate to handle the real underlying dispute. It is not clear that the section 133 referral mechanism (and the bilateral contractual disputes it seeks to resolve) is intrinsically better or to be more valued than the statutory mechanism to resolve multi party jurisdictional disputes in section 99 (and the labour relations stability it seeks to attain). In fact the jurisprudence outlined below suggests to the contrary. Perhaps the most apposite review of the underlying principles is contained in *Comstock Canada Ltd.*, 2004 CanLII 15740 ON LRB:

> 2. In most cases, where the dispute in a grievance is, at root, a jurisdictional dispute, the Board will defer consideration of a section 133 referral to the jurisdictional dispute. In part, this practice is based on the fact that a grievance is a dispute between two parties (in this case, between the Millwrights and each of the employers). When the dispute involves the rights or interests of a third party, that is properly dealt with in a jurisdictional dispute, which is a multi-party proceeding. In *CUPE v. CBC* [1992] 2 S.C.R. 7, the Supreme Court of Canada said that in circumstances where a grievance has been filed claiming work that is performed by

members of another union, it was necessary to give the other unions notice of the fact that the grievance was being referred to arbitration. Unlike the Ontario Court of Appeal (whose decision is reported at (1990) 170 D.L.R. (4th) 175), it specifically refrained from saying what should be done once the third party, the union, is given notice. In that case, there was some question about whether there was a jurisdictional dispute process under the Canada Labour Code.

3. The Board has consistently determined that it is inappropriate to determine what is essentially a jurisdictional dispute in the context of a grievance referral, see for example *ES Fox Limited* [1992] OLRB Rep. April 431. Even if the third party union were given status in the grievance referral, the Board would only be adjudicating the rights of the grieving union under its collective agreement. A jurisdictional dispute permits all parties to put forward their rights and claims (which generally conflict and overlap) and allows the Board to adjust and adjudicate the conflict between those rights and claims. This process is one which inevitably means that the rights and claims of one party will be held in priority to the rights and interests of another party. For this reason, the Board has consistently refused to entertain jurisdictional disputes in a section 133 referral, even where all parties consent to and request the Board to follow that process.

4. There are, however, occasions on which the Board will proceed with a grievance, or more accurately, part of a grievance, before deferring the process to a jurisdictional dispute. This is particularly so where the grieving union concedes that its claim to the work is founded on a right under the collective agreement and where there is an issue as between the grieving union and the employer as to whether that right is to be found in the collective agreement at all. Examples of these sorts of cases include:

(a) Where the existence of the collective agreement is in question: *Schindler Elevator Corp.*, [1990] OLRB Rep. Oct. 1092, OPG Inc., [2002] OLRB Rep. Nov./Dec. 1139; *Vic West Steel Ltd.* [1991] OLRB Rep. Jan 111.

(b) Where the dispute is based on a subcontracting clause and there is a question as to whether the subcontracting clause actually requires the work to be subcontracted to a contractor bound to the same or similar collective agreement: *State Contractors Inc.* [1993] O.L.R.D 2798.

(c) Where the claim for work is contained in a grievance, and the grievance may be untimely: *Ontario Hydro*, [1998] OLRB Rep. July/Aug. 690, *Calorific Construction Limited* (unreported Board File 2115-87-G, Feb. 12, 1988).

(d) Where the work in dispute may not be covered by the grieving union's collective agreement: *Sarnia Wolverine Manufacturing Ltd.*, [1994] OLRB Rep. Jan. 68 – although this is not always the result with that particular issue.

(e) A failure to hold a mark-up meeting: *Ontario Hydro*, [1992] OLRB Rep. Jan. 47, although the question of remedy could

> probably not be dealt with until a jurisdictional dispute is concluded.

The common element in all of these cases is best summed up by the Board in *Sarnia Wolverine Manufacturing Ltd., supra*, at paragraph 23:

> 23. Thus, there are issues upon which the Board can adjudicate within the context of [a section 133] referral of a grievance which may be dispositive of the jurisdictional dispute. Moreover, within the context of the grievance referral, there are issues upon which the Board can adjudicate which do not involve jurisdictional matters, and the resolution of those issues may mean that a jurisdictional dispute no longer exists.

It must be said, however, that the determination of the jurisdictional dispute will occur only if it does so without affecting the rights of the third party union whose members performed the work, since that union will not be a party to the section 133 referral.

...

7. We confess there is some attraction to the position of the Millwrights. However, we are unable to sever that issue entirely from the jurisdictional dispute issue. The factual issues of whether there was a mark-up, whether Tomlinson Steel is bound by the mark-up awarded by Comstock, and whether Tomlinson did, in fact, breach the collective agreement, are all issues that are essentially a private dispute between the Millwrights and Tomlinson. **The difficulty lies in the remedy proposed. That remedy inevitably affects the Ironworkers. It is in reality an attempt to define the agenda for the jurisdictional dispute adjudication.** Tomlinson stated that it would urge the Board to apply the factor of economy and efficiency in the assignment of work in the jurisdictional dispute, and that such a result might well conflict with the strict application of the International Agreement. If this panel were to grant the relief sought in this referral, it might limit discussion in the jurisdictional dispute to the application of the Agreement.

...

9. For that reason, we are unable to deal with the issue of the effect of the markup meetings (or failure to hold a markup meeting) separately. **To do so would be a way of setting the parameters of the debate in the jurisdictional dispute in a process that excludes the Ironworkers. Alternatively, we run the risk of inconsistent decisions about precisely the same dispute as between the grievance panel and the panel deciding the jurisdictional dispute. A resolution of this portion of the grievance will not resolve any part of the jurisdictional dispute.**
(emphasis added)

8. There is no dispute, nor do the Labourers resile from the fact, that the remedy the Labourers ultimately seek, *inter alia*, is damages. That remedy, in the words of *Comstock*, "inevitably affects" the Painters. Again, in the words of *Comstock*, the Labourers' argument that primacy should be given to its collective agreement rights (since the Painters have no collective agreement with Dineen) "is in reality an attempt to define the agenda for the jurisdictional dispute adjudication".

9. The approach enunciated in *Comstock* is by no means unusual. Although it is true that in *Comstock* the employer was not bound by two competing and conflicting agreements (as the Labourers argued), there have been many cases where this approach has still been applied where the employer was bound only by one collective agreement. See for example *AC Leadbetter and Sons Inc.*, 2000 CanLII 12422 ON LRB where essentially the very same arguments were being made – see paragraphs 59 to 61:

> "59. ... The Board's longstanding jurisprudence with respect to deferrals of grievances where there is an underlying jurisdictional dispute, including in situations where one of the trade unions does not have a collective agreement with the subcontractor (or with the general contractor), has not been altered by the decision in *PCL/AGS*.
>
> 60. The Board in *Ellis-Don (supra)* in its decision dated October 2, 1992 deferred a section 133 grievance where the work was assigned by a contractor to a union with which it did not have a collective agreement. Paragraph 3 of that decision states:
>
> > 3. In the case at bar there is an intertwining of contractual matters with work assignment matters. If the Board were to find that Ellis-Don had properly assigned the work in question to the Painters then Ellis-Don might be successful in its defense of the grievance filed by the Ironworkers. In a jurisdictional dispute should Ellis-Don be found to have made an improper work assignment then the grievance would be brought back on and should the Ironworkers win, damages for failing to subcontract to a company with contractual relations with the Ironworkers would be assessed.
>
> 61. As the Board said in paragraph 5 of the above *Ellis-Don* decision "there is no reason why the jurisdictional dispute forum is not the proper forum to deal with a situation where a work assignment is given by a contractor to a trade with which it does not have a collective agreement".

I recognize that the Board's jurisprudence with respect to damages in a grievance following the determination of a jurisdictional dispute has shifted since the *Ellis-Don, supra* decision referred to in *A. C. Leadbetter*, but in my view, it does negate the reasons for the preference for jurisdictional disputes – nor obviously did it in *A. C. Leadbetter*.

10. See also *Squire Masonry Ltd.*, [2005] OLRD No. 1631 where again the Union argued that the Board ought not to defer its section 133 referral pending a jurisdictional dispute because the other union did not have a collective agreement with the responding party employer:

> "7. Fundamentally, we reject Local 2's position. Firstly, it is the Board's practice to defer to the jurisdictional dispute process in circumstances such as these. While that practice may not be reflected in extensive case law, it is a practice that has real importance in the day-to-day operation of the Board. It is a practice which is relied on by parties and ought not to be changed without good reason. No such reason is present in this case.

> 8. Secondly, the issues raised by Local 2 are issues that can be raised as part of the jurisdictional dispute proceeding in accordance with the Board's practice. Local 2 is not fundamentally prejudiced by making its arguments in that proceeding."

Again, like *Squire Masonry Ltd.*, the Labourers will be able to argue in the jurisdictional dispute that the primary consideration ought to be its collective agreement. The Labourers are not prejudiced by being deprived of that argument. What the Labourers really seek to do is, by virtue of its argument of the primacy of its collective agreement rights, which collective agreement would be only one of the several factors to be considered in a jurisdictional dispute, bypass the jurisdictional dispute process altogether. The modern jurisprudence (for the reasons enumerated why a jurisdictional dispute is a better forum to resolve such an underlying issue than a grievance referral) does not countenance this.

11. See also *Ellis-Don Construction Ltd.*, [1992] OLRB Rep. October 1071, at paras. 3-4 referred to in both *Squire Masonry* and *A. C. Leadbetter*, where again the very same argument that only one of the unions had a collective agreement with a general contractor was made to prevent the deferral of a subcontracting grievance referral to a jurisdictional dispute, and was rejected by the Board.

12. In fact, notwithstanding the artful and selective editing of the cases referred to by the Labourers, the cases it refers to really say the same thing. In *Robertson Yates Corporation Limited*, *supra*, (albeit the company in that case was bound to competing collective agreements) the Board stated in paragraph 22:

> "... In practical terms, albeit indirectly, the applicant union is requiring the employer to assign the work in question to it. The grievance itself is clearly a demand by the union for the work in question. Although damages are sought in the grievance, they would only flow if the work was subcontracted in breach of the collective agreement. Implicit in the damages claim is the assertion that the work is carpenters' work covered by the agreement, performed by carpenters. The Carpenters made this clear to RYCO, that the work was theirs. When that grievance was communicated to the subcontractor, the applicant indirectly demanded the work of the employer. This remains so even though neither the general contractor nor the grieving trade union has directly put pressure on the subcontractor to comply with the grievance demand or to somehow redirect the work. What matters is that, because of the way the construction industry works in this province, the demand for the work by the union was for all practical purposes a demand made of the employer, United Flooring. In this respect, it is worth noting that both United Flooring and the Labourers' recognized that a demand for the work was being made upon United Flooring. The grievance prompted the Labourers to put RYCO on notice that it would file a grievance if the work in question was removed from its members.

13. In *Precon Company, a division of St. Mary's Cement Limited (supra)*, albeit under an older analysis of what constituted a demand for work adequate to trigger a jurisdictional dispute (and the now unnecessary agency theory), ultimately the Board did defer the grievance to the jurisdictional dispute. In *Vic West Steel Limited*, *supra*, the Board did not defer the grievance referral to the jurisdictional dispute but only because there was a question of whether the grieving union had any bargaining rights at all and whether the responding employer was bound to any collective agreement with the grieving union – one of the exceptions listed in *Comstock*, *supra*. It is also noteworthy that *Vic West* is a 1991 decision where the

Board comments on the then-existing manner in which jurisdictional disputes were heard before the Board as "taking too long and are too expensive to litigate before the Board". The Board no longer conducts jurisdictional disputes in that manner with *viva voce* evidence but now conducts them by way of consultation so that jurisdictional disputes proceedings have now become both expeditious and efficient – ironically, sometimes more so than grievance referrals.

14. In *Schindler Elevator, supra*, although the Board did not defer the grievance to the jurisdictional dispute in the unique circumstances in that case, it only delayed the deferral argument. The Board allowed the union that was not a party to the collective agreement to continue to participate in the grievance referral and allow it to raise the issue of deferral to a jurisdictional dispute later in the proceedings and in particular if the issue of damages arose. The Labourers candidly conceded that was not the ideal solution they were seeking here. In any event, proceeding in the manner that was used in *Schindler* would not appear to be an appropriate way of proceeding in these circumstances where the merits of the Labourers' grievance against Dineen appear to be not particularly complex.

15. The only case that the Labourers referred to where the Board refused to allow the grievance to be deferred to a jurisdictional dispute in a situation where the responding party employer is bound only to one collective agreement was the decision in *Bruce Power, supra*. However, a close review of the *Bruce Power* decision indicates at paragraph 4:

> "4. The applicant asserts that this work should have been performed by its members and **relies on the language in the scope clause and a relevant Letter of Understanding in the Principal Agreement between Bruce Power LP and the Canadian Union of Skilled Workers (the "CUSW agreement"). The main parties to this dispute have a different interpretation of the language of the CUSW agreement and the related Letter of Understanding. Bruce Power asserts that the subcontract to Fox and the ultimate performance of the work by the members of the IBEW are consistent with the CUSW agreement and the parties' practice. It has a number of arguments, including that CUSW had notice of a mark up meeting for this work in October 2008 for work that began in November 2008, and did not file this grievance in the face of that knowledge until April 2009. The applicant asserts that both the language of the CUSW agreement and the past practice of these parties support its position."**
> (emphasis added)

16. As a result the Board could conclude "CUSW seeks an interpretation" of its collective agreement and therefore justifiably say at paragraph 16:

> 16. In this case there is no labour relations purpose in deferring this grievance to the jurisdictional dispute mechanisms of the Act. CUSW seeks an interpretation of the collective agreement. The jurisdictional dispute procedure is not appropriate for this case because the dispute is not about the trades competing for work where both are bound to agreements with a contractor or subcontractor. A jurisdictional dispute will not resolve what is at issue in this grievance. CUSW has a collective agreement with Bruce Power and Fox does not. The IBEW has a collective agreement with Fox and Bruce Power does not. If Bruce Power was required to perform the work directly, the work would have gone to the CUSW members with whom Bruce is in

> contractual arrangements. If Bruce Power was entitled to have the work done as it did, it was subcontracted to Fox who would use IBEW members without any requirement to use CUSW members.

In other words, the dispute was essentially contractual which is again one of the exceptions listed in *Comstock*, *supra* where the Board does not defer the grievance referral to the jurisdictional dispute.

17. Again, in my view, the Board's jurisprudence is now well established. As counsel for the Painters argued, the community has a reasonable expectation that well established and long standing jurisprudence will continue to be applied (although obviously in appropriate if not common circumstances the Board has the right to alter the course of such jurisprudence). In fact, it is for the reason that jurisprudence is so well established and long standing that the Board administratively adjourned the Labourers' referral without receiving or hearing any submissions from the Labourers – because it (perhaps unwarrantedly) expected the Labourers not to question such long standing and well established jurisprudence. Since they were given no opportunity to make submissions, the Labourers were given an opportunity to make such submissions in this hearing. Having heard the submissions of the Labourers, I am unconvinced that the now well established jurisprudence ought to be varied in the circumstances of this case. Accordingly, the referral will be deferred pending the outcome of the jurisdictional dispute.

18. The hearing was also scheduled to deal with the pre-hearing consultation with respect to the jurisdictional dispute. After much discussion, the parties agreed that the work in dispute would be described as follows:

> The removal of vinyl asbestos floor tiles and related sheeting and adhesive and removal of asbestos insulation on piping in compliance with all legal requirements on the 5th floor of the G wing of Lakeridge Health Centre, Oshawa Ontario (OLRB Area No. 9).

19. In order to facilitate the releasing of this decision, the parties agreed to a somewhat lengthier timetable for the filing of briefs. The brief of the Labourers will be filed by **August 31, 2012**. The briefs of the other parties will be filed by **October 15, 2012**. Any response by the Labourers will be filed by **November 5, 2012**. The consultation with respect to this jurisdictional dispute will take place on **November 29, 2012** at 9:30 a.m. at the Board's offices at 505 University Avenue, 2nd Floor Boardroom, Toronto, Ontario.

2296-11-U Gail Myles, Applicant v. Alliance Employees Union (AEU), Responding Party v. Union of National Employees, Intervenor.

Duty of Fair Representation – Remedies – Among other complaints the applicant alleged that her union failed to advise employees as part of the ratification process that the employer had given notice during collective bargaining of its intention to revert to the strict language of the collective agreement with respect to an article in the collective agreement addressing entitlement to work at home – The article required employees to request prior approval, although the employer had been allowing employees, such as the complainant, to work from home for some time without seeking prior approval – The employer did advise the union that it intended to strictly enforce the work at home article, however during the course of two ratification procedures the union did not advise the employees of the notice

given by the employer – The Board found that this was not a case of an inadvertent mistake having been made in the material circulated during the ratification process, but rather a case of a complete absence of communication regarding the elimination of a term or condition of employment during a critically important part of the collective bargaining process – The Board found the failure of the union to advise employees that the employer was going to eliminate a term and condition of employment that they had enjoyed for a number of years reflected a complete disregard for the critical consequences to employees and undermined the statutory purpose of requiring ratification votes, and accordingly the failure was arbitrary and a breach of s. 74 – Concerning remedy the Board found that the complainant lost the opportunity to discuss the matter with fellow employees, which may or may not have gotten the issue back to the bargaining table and may or may not have resulted in some change – The Board advised the parties that it saw this as a mere loss of opportunity which will only attract nominal damages and remained seized to address damages if the parties could not agree on the quantum – Declaration made; Application granted in part

BEFORE: *Larry Steinberg*, Vice-Chair.

APPEARANCES: *Gail Myles* appearing on her own behalf; *Kelly Doctor*, *Elaine Massie* and *Lucette Charron* appearing for the responding party; *John Westdal* and *Franco Picciano* appearing for the intervenor.

DECISION OF THE BOARD: August 23, 2012

1. This is an application alleging a violation under section 74 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act").

2. The application relates to a number of grievances that the responding party filed on behalf of the applicant and, as well, relates to the actions of the responding party during ratification for the current collective agreement.

3. In support of her application, the applicant filed seventeen pages of single spaced written submissions and more than five hundred pages of emails, correspondence and other documentation. She also filed additional written submissions and documents in response to the material filed by the responding party.

4. The application proceeded to consultation on July 5, 2012. At the outset of the consultation the parties were advised by the Board of the process involved in a consultation and the possible outcomes.

5. After hearing from the parties, the Board dismissed the application save and except for the allegation that the responding party violated section 74 by failing to advise employees that the intervenor had given notice during collective bargaining that it intended to revert to the strict language of Article 39.01 of the collective agreement. On that issue the Board reserved its decision.

6. After considering the evidence and the cases cited by the parties, the Board declares that the responding party violated section 74 by not advising the employees in the bargaining unit that the Employer had given notice that it intended to revert to the strict language of Article 39.01 and awards damages for the applicant's loss of opportunity to discuss this with fellow employees during the

ratification process. The following are the Board's reasons for upholding this aspect of the application and dismissing the rest of the application.

The Parties

7. The applicant, Gail Myles ("the applicant") is employed by the Union of National Employees ("the intervenor") as a Labour Relations Officer.

8. The intervenor is a component of the Public Service Alliance of Canada but, for purposes of this application, it is the Employer.

9. The applicant is represented in her employment relationship with the intervenor by the Alliance Employees Union (AEU) ("the responding party"). At all material times, the responding party and the intervenor have been parties to a collective agreement effective from May 1, 2010 until April 30, 2013.

What the Applicant Complains About

10. During the consultation, it was possible to mine the materials filed by the applicant and focus on four things that appear to form the real issues about which the applicant complains. Throughout the consultation the applicant asserted that, in addition to focusing on these four things, it was necessary to also have in mind what she asserted was a pattern of improper behaviour by the responding party towards her. Unfortunately, the applicant encountered great difficulty in articulating the facts she asserted supported her view and equally, great difficulty in directing the Board to the relevant documents from among the hundreds that were filed.

11. The four issues which were specifically addressed at the consultation were the actions of the responding party in relation to:

(i) a grievance dated February 23, 2010 alleging harassment by the intervenor ("2010 harassment grievance");

(ii) a grievance dated December 15, 2010 alleging a violation of the collective agreement and past practice with respect to the intervenor's work from home policy ("work from home grievance");

(iii) two grievances filed on April 15, 2011 and August 26, 2011 alleging in effect a failure by the intervenor to permit the applicant to work from home on a regular basis and by refusing to allow her to choose the days on which she works from home ("the accommodation grievances"), and

(iv) the failure of the responding party during the ratification process for the current collective agreement to advise employees that the intervenor had given notice that it intended to apply the strict terms of Article 39.01 of the collective agreement ("the ratification process").

Preliminary Issue - Prematurity

12. The responding party requested that the application be dismissed since it was premature at least with respect to those parts of the complaint alleging a breach of section 74 in relation to the actions and decisions of the responding party in dealing with the various grievances noted above. The responding party cited *Bogdanovski v. CAW Local 385*, 2001 CanLII 2505 (ON LRB) in which the Board stated that "...where the subject matter of the complaint is still in the grievance and arbitration procedure" an application under section 74 is premature.

13. While the decisions of the responding party regarding those grievances seemed to follow a rather belated timeline, by the time of the consultation, the 2010 harassment grievance had been referred to arbitration on some but not all of the issues which the applicant wanted to raise. The accommodation grievances have been referred to arbitration in their entirety. An arbitrator has been selected and a hearing is scheduled for October 23, 2012.

14. With respect to the work from home grievance, the responding party is still attempting to negotiate a resolution of the grievance but has decided that it will not pursue that matter to arbitration.

15. The applicant was very critical of the time it took for the responding party to finally decide what it intended to do with these grievances. In her view, the responding party only decided to refer the grievances in response to her complaint and the impending consultation before the Board. There may be some merit to the applicant's position. Nevertheless, among the remedies requested by the applicant in her application was that her "grievances proceed to arbitration".

16. The accommodation grievances and much of the harassment grievance have, in fact, been referred to arbitration, an arbitrator has been selected and a date for hearing has been set. The Board's remedies are designed to be remedial in nature and where, as here, the very remedy requested by the applicant has been implemented by the responding party, it is difficult to understand what remedy the Board can usefully provide.

17. It should be noted that the applicant also requested that she be provided with independent legal counsel of her choice at the responding party's expense, that a posting of the Board's findings be made in all workplaces where the members of the responding party work and that the responding party and intervenor be ordered to pay all her legal costs and expenses incurred to date.

18. There is no basis for awarding any of these remedies. There is no evidence that the responding party acted in bad faith in its representation of the applicant as would justify independent counsel. And even if the Board has the authority to award legal costs it is not appropriate here in view of the fact that all but one of the allegations supporting the application are dismissed. Finally, there is nothing so egregious in the actions of the responding party that a posting is necessary.

19. Accordingly, there is merit to the position of the responding party that the application is premature in relation to the grievances that are proceeding to hearing. That is obviously not the case in respect of the work from home grievance, that part of the harassment grievance that is not being referred and the conduct of the responding party during ratification of the current collective agreement. These matters are addressed in this decision.

The Practice of the Responding Party

20. It is important to understand the responding party's practice in referring grievances to arbitration in order to understand how it processed the applicant's grievances.

21. The responding party refers almost all grievances to arbitration which, on their face, disclose a *prima facie* breach of the collective agreement in order to ensure compliance with the time limits in the collective agreement. And, in some cases, grievances are referred to arbitration before they are assessed to determine if they disclose a *prima facie* violation of the collective agreement.

22. Once a grievance is filed the Grievance Committee ("GC") of the responding party will examine the matter and meet with the grievor and his/her local representative. The GC will then make a recommendation to the Executive Committee ("EC") of the responding party, which makes the final decision as to whether a grievance will be pursued to arbitration.

23. From the information provided at the consultation, it appears that the EC will accept or reject recommendations of the GC and will also seek a legal opinion regarding the chances of success of any particular grievance. Importantly, it seems that grievors are given the opportunity to meet at length with legal counsel before such opinions are rendered and the EC will adopt the advice of counsel even if that advice requires the EC to change its decision on whether a grievance goes to arbitration or not.

24. It is also worth noting that grievors are not advised of the recommendation of the GC but only of the decision of the EC. In this case, the applicant became aware of the recommendations of the GC through the proceedings of the Board. The EC did not always adopt the recommendation of the GC. The applicant viewed this as demonstrative of the responding party acting in bad faith. To the contrary, it demonstrates that the responding party turned its mind to each grievance, made its own decision and, more often than not, sought legal advice before any final decision was made.

25. Section 74 of the Act reads as follows:

> **74.** A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

26. For purposes of section 74 arbitrary conduct has been defined as conduct that is "flagrant, capricious, totally unreasonable, or grossly negligent…. Mistakes or misjudgements by the union are not illegal under the Act. (*Edith T. Quesnel* 2004 CanLII 25607 (ON LRB) ("*Quesnel*") at paragraph 13). Discriminatory conduct is conduct that is "based on invidious distinctions without reasonable justification or labour relations rationale" (*Quesnel, supra* at paragraph 13). Finally, bad faith has been defined as conduct that is "motivated by ill-will, malice, hostility or dishonesty (*Quesnel, supra*, at paragraph 13).

The 2010 Harassment Grievance

27. This grievance was filed on February 23, 2010 and arises out of a set of extremely complex facts.

28. It relates, in part, to a harassment complaint filed by the applicant in 2008 and a Memorandum of Understanding signed in 2009 ("2009 MOU") by the applicant and the intervenor (but not the responding party), which settled the 2008 harassment complaint. The incidents on which the 2010 harassment grievance was based spanned the period from March 2009 to June 2010, which was well after the grievance was filed. Included in this period was a harassment complaint filed by a co-worker against the applicant.

29. In her initial grievance, the applicant sought an a number of remedies including that an investigation be carried out, a recommitment to the 2009 MOU, training for managers and that the intervenor provide evidence that her co-worker's allegations against her were made prior to February 5, 2010.

30. After discussions among all parties, a third party investigator was agreed to. She investigated the applicant's harassment issues at the same time as she investigated the co-worker's allegations against the applicant. The Investigator produced two reports in respect of each complaint in October 2010. She found that two allegations made by the applicant's co-worker against the applicant were founded. No disciplinary or other action was taken against the applicant as result of this finding. The investigator also found that two of the applicant's complaints against the intervenor were founded.

31. No grievance was filed challenging the results of the report or the process followed during the investigation. Nevertheless, these became major issues for the applicant as is evident in an email from her to the responding party on April 14, 2011 in which she outlined what remedies, in addition to those claimed in her grievance, she was seeking. These remedies included a finding that her co-worker's complaint against her was frivolous and vexatious, that her name be cleared and her reputation restored that a new reporting relationship be established and a return of sick leave taken.

32. On April 28, 2011, the GC decided to recommend to the EC that the referral to arbitration of the 2010 harassment grievance be limited to the two allegations which were determined by the investigator to be founded and one allegation which was determined not be founded since the GC felt the investigator erred. In addition, the GC decided that the referral would not include any allegations related to the investigation or the subsequent report concerning the applicant, that the referral not include allegations that predate the 2009 MOU and that of the additional remedies sought by the applicant only two be pursued, namely a new reporting relationship and return of sick leave.

33. The EC agreed with the recommendation of the GC. But that was not the end of the matter. The applicant was very unhappy that the matters surrounding her co-worker's complaint and that the subsequent investigation and report were not being pursued. In a meeting with the responding party and its counsel in June 2011 the applicant was advised that unless there was evidence that the intervenor promoted the complaint against her, the issue was not arbitrable.

34. Over the course of the summer, the applicant sent a variety of documents to the responding party to convince it to pursue the matter of the complaint against her. There were also several new issues raised by these documents.

35. Counsel for the responding party met with the applicant and two potential witnesses in August 2011. After considering all of this information the responding party concluded that there was no evidence that the responding party encouraged the filing of the complaint against the applicant.

36. Finally, after the applicant refused to participate in a mediation of her grievance, the responding party sought another legal opinion regarding the chances of success of the grievance including the new recent matters raised by the applicant. On November 28, 2011, after receipt of the legal opinion it requested, the responding party advised the applicant that it would proceed to arbitration regarding seven incidents of alleged harassment during the period from March 2009 to February 2011. The matters concerning the complaint against her, the investigation and subsequent report were not included.

37. In light of the above, when asked at the consultation what more the responding party could have done, the applicant focused on the alleged violation by the intervenor of the 2009 MOU and insisted that it should proceed to arbitration. Moreover, she continued to focus on the fact that in her opinion the intervenor supported the complaint against her by her co-worker and that the responding party did not turn its mind to the serious flaws in the investigation itself.

38. There is no merit at all in the applicant's position. The responding party went above and beyond what any reasonable trade union would do in assessing the merits of the issues which the applicant wanted to litigate under the umbrella of the harassment grievance. The responding party sought a legal opinion as to whether allegations that were the subject of the 2008 harassment grievance and 2009 MOU were arbitrable. The advice (which is undoubtedly correct) was these allegations were not arbitrable.

39. The responding party sought another legal opinion regarding the chances of success of all the issues raised by the applicant in her grievance and the new issues brought forward in the summer of 2011. Based on that advice, the responding party decided to rely on some of the incidents at arbitration.

40. In addition, the applicant was given the opportunity to meet with the GC and, on two occasions, with legal counsel to address her concerns. The evidence was that the GC considered all of the evidence and was prepared to listen to the applicant and to add additional items to the matters to be referred to arbitration where the facts warranted it.

41. As for the decision not to rely on an allegation that the intervenor promoted the complaint against her, the responding party, after giving the applicant more than sufficient time to provide evidence to support that allegation, decided that there was no credible evidence to support that allegation. From the evidence and submissions made at the consultation, the responding party was correct in that assessment.

42. There is nothing at all in the evidence that supports a finding that the responding party's actions were arbitrary, discriminatory or in bad faith. There is no evidence of bad faith or discriminatory behaviour by the responding party. Moreover, its handling of the grievance is the very antithesis of arbitrary conduct. The responding party did precisely what was required of it in deciding how to process the grievance. The responding party took into account all relevant information, carefully examined the allegations of the applicant, made a reasoned decision regarding the chances of success of the grievance, sought and received legal advice and proceeded to act in accordance with that advice.

Work from Home Issues

43. The applicant has made a complaint in respect of two matters concerning her right to work from home. The first is the failure of the responding party to advise employees as part of the ratification process that the intervenor had given notice during collective bargaining of its intention to revert to the strict language of Article 39.01 of the collective agreement. The second is the refusal of the responding party to proceed to arbitration on a grievance in respect of the intervenor's work from home policy.

(i) The Ratification Process

Article 39.01 of the collective agreement provides as follows:

> **Working from Home**
>
> **39.01** An employee who wishes to work from home on an assigned task(s) shall request prior approval from their immediate supervisor. Such approval shall not be unreasonably withheld. The parties recognize that such requests shall not be normal recurring working conditions, unless there are extenuating circumstances.

44. For some period of time the intervenor permitted employees, including the applicant, to work from home almost as a matter of course and without prior approval of their supervisor.

45. During bargaining for the 2010-2013 collective agreement, the intervenor advised the responding party that it intended to strictly enforce Article 39.01. The responding party believed that there was nothing unreasonable in the requirements of Article 39.01. In addition, the responding party was under the now admitted mistaken impression that, once it had tabled its proposals, it could not subsequently table any additional proposals. Accordingly, it did not make any proposals in response to the notice given by the intervenor.

46. More significantly for present purposes, during the course of two ratification procedures, the responding party did not advise the employees in the bargaining unit of the notice given by the intervenor. In September 2010, a proposed collective agreement was presented to employees. The ratification materials presented to employees did not mention the intention of the intervenor to strictly apply Article 39. That agreement was not ratified and the bargaining team was instructed to return to the table to obtain more generous post-retirement medical benefits. A second ratification vote was held in October 2010 after the responding party had negotiated a change in post-retirement benefits. Once again, the ratification material given to employees did not refer to the intervenor's intention to strictly apply Article 39.01 of the collective agreement. The proposed collective agreement was ratified.

47. Employees only became aware of the change to the administration of Article 39 when they received a memo dated November 1, 2010 from the President of the intervenor. The memo stated that during bargaining with the responding party, Article 39.01 was discussed. It further stated that "In talks with the AEU, we clarified that working at home would be approved under the conditions set out in the collective agreement". The memo went on to specify what those conditions would be.

48. The applicant asserted that the failure to advise or in any way communicate with employees in the bargaining unit that the intervenor intended to strictly apply Article 39 is a violation of section 74 of the Act. She argued that bargaining unit employees are entitled to be informed of all changes in their terms and conditions of employment so that they can make an informed decision whether to ratify a proposed collective agreement. She pointed to the fact that the first proposed collective agreement was defeated in a ratification vote and the bargaining team was instructed to return to the bargaining table to obtain an improvement in post-retirement benefits which were, in fact, obtained. She asserted that the bargaining unit employees were deprived of the very same opportunity to consider the imminent change in the administration of Article 39.01. In support of her position the applicant cited *Loblaws Supermarkets Ltd.*, [2003] OLRB Rep. November/December 990 ("*Loblaws*"); *Quesnel, supra* and *Re Connolly* [1998] C.L.R.B.D. No. 18.

49. The responding party argued that a notice such as that provided by the intervenor at bargaining need not be communicated as part of the ratification process because there is nothing to be ratified since there was no change in the language of Article 39.01 and the intervenor was absolutely entitled to give such notice. Moreover, in this case, the responding party was under the mistaken view that once it had submitted proposals to the intervenor at the outset of bargaining it could not add to or amend those proposals. The responding party asserted that union representatives are entitled to make mistakes without being in violation of the duty of fair representation.

50. In her application the applicant was critical of the fact that the responding party did not advise employees of the intervenor's intentions regarding Article 39.01 "during discussions with the membership; nor during the actual ratification vote meeting". This decision only deals with the lack of communication during the ratification process since the submissions at the consultation focused on that and there is no evidence regarding the nature, type, frequency or timing of discussions otherwise than during ratification.

51. The applicant asserted that the responding party acted in bad faith and in a discriminatory manner when it "colluded with the employer during collective bargaining in 2010" in regard to the work from home practice. There is no evidence to support these assertions.

52. Based on the evidence before the Board, the actions of the responding party demonstrate a complete absence of bad faith as defined in the case law. The applicant has chosen to view perfectly innocent and normal behaviour on the part of the responding party as evidence of bad faith in its "collusion" with the employer regarding the issue of working from home. An example is her assertion that the fact that the chief steward, who was also a member of the bargaining committee, circulated the memo dated November 1, 2010 to all members of the responding party as evidence of the responding party's collusion "direct or indirect".

53. Similarly, there is no evidence that the responding party acted in a discriminatory manner during the ratification process in regards to Article 39.01. The focus of the applicant's argument is that since she worked from home more frequently than her colleagues to the knowledge of the responding party, then the actions of the responding party are discriminatory. The fact that the applicant may be differentially impacted by the strict application of Article 39.01 does not involve anything approaching discriminatory representation by the responding party. There is a sound labour relations rationale for what occurred at bargaining and its effect on the administration of Article 39.01 and the responding party made no invidious distinctions among the employees in the bargaining unit.

54. The applicant also asserted that the responding party's conduct was arbitrary. In assessing whether the conduct of the responding party was arbitrary, context is important. The only real opportunity available to employees to have a direct influence on their terms and conditions of employment is during periodic collective bargaining. The ratification process is an important element of that since it ensures that the views of those who must work under the terms and conditions of a collective agreement have a direct say in what those terms and conditions of employment will be. In addition, a collective agreement ratified by a majority vote of the bargaining unit will be seen to be legitimate by bargaining unit employees even if they did not vote to ratify it.

55. Section 44 that the Act, which requires mandatory ratification votes in cases such as this, does not attempt to regulate the content or quality of the communications between a trade union and employees

in the bargaining unit during the ratification process. Section 44 only deals with the process to be followed and matters of eligibility to vote.

56. Nevertheless, in order for a ratification vote to be meaningful, employees are entitled to be advised of what changes (whether by way of addition, deletion or amendment) to their terms and conditions of employment will be made by ratifying a proposed collective agreement. That is not a controversial proposition and was not challenged at the consultation.

57. In *Loblaws, supra,* the Board dealt with an application alleging a violation of section 74 when a trade union had not consulted bargaining unit employees when it agreed to mid-term amendments requested by the employer. In dismissing the application, the Board noted that section 58(5) of the Act explicitly permits such amendments and that the amendments were not a proposed collective agreement or a memorandum of settlement within the meaning of section 44 of the Act and therefore ratification was not required. However, the Board did observe that there is a duty to consult employees "in normal collective agreement negotiations". The Board stated:

> 99. …[T]he cases relied on by the applicant all concerned the obligation to consult when the union is negotiating a new collective agreement. Some sort of consultation is imperative under such circumstances. In order for the union not to act arbitrarily, particularly where, as in the cases relied on, there is no statutory obligation to ratify, it must review and consider the issues that the employees are concerned about in determining a new collective agreement. If it does not consult, the union is just concluding a collective agreement blindly.
>
> ….
>
> 101. In my view, the obligation to consult only arises when employees have something meaningful to offer as in normal collective agreement negotiations. In this case, the members' interests were entirely predictable and were taken into account. Local 1000A knew very well that many members would be against the deal and that others would be in favour. But in spite of that inevitable opposition, it determined that amending the collective agreement was the best strategy.

58. The facts of this case clearly fall within what the Board referred to as "normal collective agreement negotiations". If there is an obligation to consult in the absence of a statutory duty to ratify, there must surely also be such a duty to consult (that is to say, to advise employees what the deal is) where a statutory duty to ratify does apply. As noted above, no party at the consultation disputed that during the ratification process the obligation to consult includes advising employees of proposed changes to the language of the collective agreement. The question in this case is whether that obligation applies equally to the termination of a longstanding practice which is contrary to the strict language of the collective agreement.

59. From the perspective of the parties and employees, there is no meaningful difference between a change to the language of the collective agreement and the elimination of a longstanding practice. In this case, the intervenor's past practice in the way it administered Article 39 was as much a term and condition of employment as those explicitly referred to in the collective agreement. The parties to collective agreements and employees rely on such practices in the very same way they rely on the language of the collective agreement. It is for that very reason that such practices cannot be altered mid-

term and that parties are required to give notice at bargaining that going forward the strict language of the agreement will be relied on. This provides an opportunity for the other party to attempt to bargain appropriate language.

60. The duty to consult must at least be consistent with the statutory purpose of the ratification process which is to provide those who will be governed by the collective agreement a meaningful opportunity to express their views in a democratic vote. This must include advising employees how their terms and conditions of employment will be changed whether by way of changes in the language of the collective agreement or the elimination of a long-standing practice.

61. The responding party asserted that its failure to do so is excusable since it resulted from its mistaken belief that once its initial proposals were tabled it could not put other proposals forward. While that may explain why it did not put counterproposals forward prior to the first ratification in September, it begs the question why it did not advise employees during ratification of the intervenor's notice regarding Article 39.01. If employees had been notified and if the issue was of sufficient concern to a majority of them, the bargaining team could have been directed to return to the table to get a better deal on Article 39.01 in the same way as they were directed to obtain a better deal on post-retirement benefits. Clearly, the responding party did not feel constrained from putting new proposals forward after a failed ratification.

62. Similarly, its view that Article 39.01, as written, was not unreasonable also begs the question as to why employees were not advised of the intervenor's position at least during the ratification process.

63. This is not a case of an inadvertent mistake having been made in the material circulated during the ratification process. This is a case of a complete absence of communication regarding the elimination of a term or condition of employment during a critically important part of the collective bargaining process. In the Board's view, this is not a case of mere negligence but rather one of gross negligence. The observations of the Board in *North York General Hospital*, [1982] OLRB Rep. August 1190 at paragraph 16 (cited in *Quesnel, supra,* at paragraph 17) are apt:

> "[t]here comes a point [...] when 'mere negligence' becomes 'gross negligence' and when gross negligence reflects a complete disregard for critical consequences to an employee then that action may be viewed as arbitrary for the purposes of section [74] of the Act".

64. The terms and conditions under which employees must work for the life of the collective agreement are of fundamental importance to them. The failure of the responding party to advise employees that the intervenor was going to eliminate a term and condition of employment that they had enjoyed for a number of years reflects a complete disregard for the critical consequences to employees and undermines the statutory purpose of requiring ratification votes. Therefore, the Board declares that the failure of the responding party to advise bargaining unit employees during the ratification process of the intervenor's position on Article 39 was arbitrary and a violation of section 74.

65. Is the applicant entitled to any remedy beyond a declaration? In the Board's view, what the applicant lost was an opportunity to discuss the matter of Article 39.01 with fellow employees. That may or may not have resulted in a direction that the bargaining committee return to the table to get a better deal on either the language or administration of Article 39.01 (as occurred with post-retirement benefits). And if the matter was returned to the bargaining table, the bargaining committee may or may not have been successful in convincing the responding party to continue its past practice or to preserve some of it.

The Board believes that the applicant should be compensated for this lost opportunity and remains seized should the parties not be able to agree on the amount of such damages.

66. In order to assist the parties in their discussion of the appropriate quantum of such damages the following comments may be helpful. Damages for loss of an opportunity in a case such as this are difficult to assess. Nevertheless, the difficulty in assessing damages does not relieve a wrongdoer of its obligation to compensate the aggrieved party. On the other hand, damages will only be nominal unless the aggrieved party can prove to a reasonable degree of probability that, but for the loss of opportunity, it sustained substantial damages. In other words, a mere loss of opportunity will only attract nominal damages.

67. Based on the evidence before the Board, this would appear to be a case of a mere loss of opportunity that would support a nominal damage award. It cannot be said with the requisite degree of probability that the loss of opportunity to discuss the matter with fellow employees would have resulted in the bargaining committee being directed to take the matter back to the table much less what would have happened if it had been directed to do so.

(ii) The Work from Home Grievance

68. As noted above, the employees in the bargaining unit were first apprised of the fact of the change in the administration of Article 39.01 when they received the memorandum from the intervenor's president on November 1, 2010. The applicant characterized this as a "New Policy" and wanted the responding party to file a grievance challenging it.

69. The responding party refused to do so because, in its view, the New Policy was consistent with Article 39.01 of the collective agreement and because a grievance would have been premature at that point (November and December 2010) because no employee had yet been prevented from working from home under the New Policy.

70. On December 16, 2010, (before the policy had been applied to her) the applicant filed her own grievance requesting that the New Policy be rescinded and that the intervenor implement their past practice for working from home.

71. Following the intervenor's rejection of the grievance on April 6, 2011 it was referred to arbitration. The GC recommended that the grievance be pursued at arbitration; however, on July 27, 2011, the EC concluded that the grievance stood little chance of success based primarily on the fact that when the grievance was filed the applicant continued to work from home as well as the fact that in June 2011, based on medical reports, the applicant was permitted to work from home three days per week as before.

72. On April 4, 2012, following a meeting with a Labour Relations Officer at the Board at which time it agreed to obtain a legal opinion, the responding party received a legal opinion that confirmed that the grievance stood little chance of success. The responding party has not yet withdrawn the grievance and, as of the date of the consultation, continued to have discussions with the Employer to attempt to resolve the matter to the satisfaction of the applicant.

73. There is nothing before the Board that supports a conclusion that the decision not to pursue the grievance to arbitration was arbitrary, discriminatory or in bad faith. To the contrary, as with the previous grievances, the responding party turned its mind to the merits of the grievance and made a reasoned

decision, confirmed in a legal opinion, that the grievance stood little chance of success. The responding party is not required to pursue such grievances to arbitration so long as its decision is not motivated by improper considerations and so long as it takes into account all relevant facts. It has done so and therefore this aspect of the application is dismissed.

Conclusion

74. The complaint is therefore dismissed in its entirety save and except the complaint that the responding party failed to advise employees during the ratification process of the intervenor's intention to strictly apply Article 39.01. The applicant is entitled to a declaration that the responding party violated section 74 and to damages for the loss of opportunity to discuss the matter with fellow employees as part of the ratification process. The Board remains seized if the parties cannot agree on the quantum of the damages.

0387-09-R; 0388-09-U Canadian Union of Public Employees Local 4800, Applicant v. **Hamilton Health Sciences Corporation**; Sodexo MS Canada Limited, Responding Parties.

Unfair Labour Practice – Related Employer – CUPE brought a related employer application and an unfair labour practice complaint arising out of the Hamilton Health Sciences Corporation's ("the Hospital") termination of its contractual arrangements for cleaning services with Sodexo MS Canada Limited ("Sodexo") – The termination of the subcontract resulted in the layoff of Sodexo's cleaning staff who were represented by CUPE – The Union submitted that the responding parties (the Hospital and Sodexo) acted as a single employer or alternatively acted in concert to commit unfair labour practices by terminating the entire bargaining unit for making a lawful wage proposal – The Hospital and Sodexo argued that they ought not to be treated as one employer because they do not carry on associated or related activities or businesses and are not under common control or direction, and that the cancellation of the contract and the resulting layoffs were due to legitimate business decisions – The Board found that although there was cooperation and coordination between the respondents, this was not sufficient to conclude that they are under common control and direction – The Board found that there was no legitimate business rationale for the responding parties' conduct and concluded that this conduct--in particular the hasty timing of the contract cancellation in concert with earlier efforts to erode employee support for CUPE--constituted anti-union *animus* and were violations of the Act – The issue of remedial relief was remitted to the parties Related employer application dismissed; unfair labour practices complaint allowed

BEFORE: *Patrick Kelly*, Vice-Chair.

APPEARANCES: *Mark Wright, Stephanie Hobbs, Dave Murphy* and *Paul Zamperin* appeared on behalf of the applicant; *Frank Angeletti* and *Linda Carson* appeared on behalf of Hamilton Health Sciences Corporation; *Michael Smyth* and *Nick Resetor* appeared on behalf of Sodexo MS Canada Limited;

DECISION OF THE BOARD: July 18, 2012

1. These are respectively applications under sections 1(4) and 96 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). They arose out of the termination by Hamilton Health Sciences Corporation ("the Hospital" or "HHS") of its contractual arrangements for the provision of non-clinical cleaning services by Sodexo MS Canada Limited ("Sodexo") at one of the Hospital's sites, thus resulting in the layoff of Sodexo's cleaning staff represented by the applicant (or "CUPE").

2. The termination of subcontracts like the one in this case is not an unusual occurrence and does not routinely trigger litigation before this Board. In fact, the contractual arrangements between the Hospital and Sodexo permitted either party to terminate the contract for any reason with sixty days' notice. From a commercial standpoint, the Hospital appears to have been perfectly entitled to walk away from its relationship with Sodexo. However, the unusual feature in this case, and a key component of CUPE's position therein, is that the Hospital's decision occurred soon after CUPE tabled with Sodexo its collective bargaining proposals, including a wage proposal seeking a large pay increase to bring Sodexo's cleaners to the same level of pay as the Hospital's cleaners.

3. CUPE submits that the responding parties, acting as a single employer under subsection 1(4) of the Act or alternatively acting in concert, committed unfair labour practices by, among other things, terminating the entire bargaining unit for making a lawful wage proposal, in violation of sections 70, 72(a) and 72(c) of the Act. Among the remedies sought by the applicant are the reinstatement of the members of the bargaining unit together with damages to the employees and to CUPE.

4. The Hospital and Sodexo contend that they ought not to be treated as one employer because they do not carry on associated or related activities or businesses and are not under common control or direction. In addition, they say that, even if they are associated or related businesses under common control or direction, the Board ought not to exercise its discretion under subsection 1(4) to make a single-employer declaration because it would serve no labour relations purpose. With respect to the section 96 application, the responding parties say they have committed no unfair labour practices.

The Evidence

5. The following individuals testified for Sodexo: Brenda Berry, Unit Manager; Brian Kimmett, Regional Vice President, Operations; and Paul Porteous, General Manager (at the relevant time). Linda Carson, Director of Customer Support Services, testified on behalf of the Hospital. CUPE's witnesses were Cheri Dobbs, National Representative and Dave Murphy, the applicant's current President and, at the relevant time, its Interim President.

The parties and their relationships with one another

6. The Hospital is a public hospital pursuant to the provisions of the *Public Hospitals Act.* The Hospital was created on November 28, 1996 out of the merger of Hamilton Civic Hospital and the Chedoke-McMaster Hospital. Prior to the merger, Hamilton Civic Hospital occupied the General site and the Henderson site; and the Chedoke-McMaster Hospital occupied the McMaster University Medical Centre ("MUMC") site and the Chedoke site. Following the merger, the Hospital continued to operate out of the General, Henderson, MUMC and Chedoke sites. In 2003, the Hospital expanded to include the Juravinski Cancer Centre ("the JCC"), where the events underlying these matters played out.

7. Sodexo is a food and facilities management service company employing over 12,000 employees in Canada. It offers a full range of outsourcing services in areas such as housekeeping, grounds keeping, food services, plant operations and maintenance. In Canada, Sodexo has approximately

275 clients, primarily in four sectors: health care institutions and retirement homes; higher education establishments; business and corporate institutions; and remote sites and mega projects.

8. CUPE is a trade union that has had a bargaining relationship with both of the responding parties. It has been party to collective agreements with the Hospital in respect of a bargaining unit of office and service employees covering the General, Henderson, Chedoke and MUMC sites since it became the bargaining agent in 2001. That bargaining unit contains Hospital cleaners who clean the clinical areas at those sites, such as the patient rooms and nursing stations.

9. CUPE's relationship with Sodexo as a cleaning subcontractor at the Hospital began in late 2008 when the applicant displaced Labourers International Union of North America, Local 837 ("LIUNA") as the bargaining agent representing Sodexo's cleaners at the JCC site. Within a few months of CUPE's certification there, all the Sodexo cleaners were laid off, an event which triggered these proceedings.

10. The bifurcation between the clinical and non-clinical cleaning functions at HHS began in the period immediately preceding the Hospital amalgamation. One of the Hospital predecessors, Chedoke-McMaster Hospital ("CMH") entered into a service agreement with Marriot Corporation of Canada ("Marriot") whereby the cleaners employed by the CMH to clean the non-clinical areas were replaced, through attrition, by Marriot's cleaners. Immediately after the amalgamation on June 16, 1997, the Hospital and Marriot expanded their service agreement to include all four of the Hospital's sites as they then existed, and to include the provision by Marriot of managers to supervise its own cleaners as well as those of the Hospital. Currently, the McMaster and General sites of the Hospital are cleaned by both Hospital-employed and Sodexo cleaners (the Chedoke and JCC sites have only Sodexo cleaners.

11. Sodexo replaced Marriot and entered into a management agreement with the Hospital on June 1, 2002 pursuant to which Sodexo was responsible for the supervision only of its own non-clinical cleaning employees. A year later, Sodexo and the Hospital entered into a renewal management agreement. Sodexo's employees at the Chedoke and McMaster sites were and continue to be represented by the Ontario Public Service Employees Union ("OPSEU"). In 2005, LIUNA acquired bargaining rights for Sodexo cleaners at the Henderson, General and JCC sites. CUPE attempted to displace LIUNA at those three sites in the latter part of 2008, but succeeded only at the JCC.

12. In the latter part of 2003, the Hospital acquired the JCC, which had been operated by Cancer Care Ontario. Up to that point, the cleaning of the JCC had been performed by a non-union company, Hurley Brothers. Shortly after the JCC's acquisition, Sodexo succeeded Hurley Brothers as the service provider for the non-clinical cleaning at JCC, and the management agreement for non-clinical cleaning that Sodexo and the Hospital executed on June 1, 2003 was broadened to include the JCC. It defined the legal and financial arrangements at all times relevant to these applications. I shall refer to it hereinafter as "the Management Agreement", and deal with it in more detail later. In the meantime, I describe briefly the labour relations history concerning CUPE's efforts to blunt the Hospital's outsourcing of non-clinical cleaning.

1. CUPE's Prior Attempts to Address the Hospital's Outsourcing Arrangements

13. On December 23, 2001, CUPE filed grievances alleging that the Hospital's outsourcing arrangement with Sodexo in respect of the MUMC site was invalid, as the Hospital had maintained effective control of the work. The grievances were heard over the span of twelve days of hearing from 2005 until 2008 and the case was not decided until October 1, 2009.

14. Meanwhile, in 2003, CUPE brought an application to the Board alleging that the Hospital's outsourcing arrangement with Sodexo at the Chedoke, McMaster and General sites made the Responding Parties related employers within the meaning of subsection 1(4), or that there had been a sale of part of a business from the Hospital to Sodexo within the meaning of section 69 of the Act. Both OPSEU (which since December 1997 represented Sodexo cleaners at the Chedoke and MUMC sites) and International Wood and Allied Workers of Canada, Local 700 (, "the IWA"), which at the time represented Sodexo cleaners at the General site), intervened in the proceedings.

15. In a decision dated February 3, 2004, (*Sodexho MS Canada Limited,* 2004 CanLII 15261 (ON LRB) ¶20-24) the Board granted the interveners' preliminary motion to dismiss the application under subsection 1(4). The Board held that it "would not in these circumstances exercise its discretion in favour of CUPE's application and grant it bargaining rights under a subsection 1(4) application. To do so would undermine existing, mature collective bargaining relationships [i.e. between Sodexo and each of OPSEU and IWA] for no real labour relations purpose." The Board also deferred CUPE's section 69 application *sine die* pending disposition of the grievances concerning the outsourcing to Sodexo.

16. As noted above, CUPE's grievances were heard and decided[2] long after the Board's decision of February 3, 2004. Arbitrator Burkett dismissed the grievances on the basis of estoppel, without addressing their merits. The Arbitrator's rationale need not be set out in detail here. Suffice it to say that one of the reasons was that the relief sought by CUPE in the grievances would have interfered with OPSEU's established bargaining rights. In *obiter*, the Arbitrator observed at paragraph 60 that:

> "This is not to say that it is not open to CUPE to seek to represent the Sodexo cleaners under the representation procedures contained in the *Labour Relations Act* for the displacement of an existing bargaining agent."

17. Indeed, CUPE next adopted as its strategy displacement applications for certification in respect of several Sodexo bargaining units located at the Hospital, including the LIUNA unit at the JCC.

2. CUPE's Campaign to Organize Sodexo Cleaners

18. In June 2008, during an open period in the bargaining relationship between LIUNA and the Hospital, CUPE commenced an organizing campaign with respect to Sodexo cleaners at the Henderson, General and JCC sites.

19. CUPE initially applied for certification on July 3, 2008. A runoff vote was held on July 10, 2008, but around the end of July, CUPE withdrew its application for certification due to an administrative error respecting the membership evidence. CUPE immediately recommenced its organizing campaign, and re-applied for certification on August 22, 2008.

20. CUPE won the representation vote at the JCC, but not at the much larger bargaining units at the Henderson and General sites. Pursuant to a decision of the Board dated December 18, 2008, CUPE was certified as the bargaining agent for "all housekeeping employees employed by Sodexo Canada

---

[2] *Hamilton Health Sciences Corporation vs. Canadian Union of Public Employees* (2009), 188 L.A.C. (4th) 405 (Burkett).

Limited at the Juravinski Cancer Centre, 699 Concession Street, in the City of Hamilton, Ontario, save and except supervisors and those above the rank of supervisor."

21. In the years prior to the commencement of CUPE's Sodexo campaign, CUPE locals had successfully negotiated or arbitrated central rates for employees of subcontractors in hospital and nursing home environments across the province. Hospital housekeeping rates, including those in Hamilton at the relevant time, were in the $19/hour range. The wages paid to Sodexo cleaners at the Hospital were far below that range.

22. At the commencement of CUPE's displacement campaign in June 2008, the wage rates for cleaners at the JCC ranged from $9.28/hour (for a starting employee) to $10.24/hour (for employees with longer than five years of service). Ontario's minimum wage at the time was $8.75/hour (and was scheduled to increase to $9.50 effective March 2009 and again in March 2010 to $10.25). As well, under the terms of the collective agreement, the JCC cleaners were entitled to two paid sick days per year and no benefits.

23. In the course of his testimony, Mr. Kimmett confirmed that Sodexo was concerned about any disruption to the "stability" that had characterized its relationship with LIUNA over the past several years, and specifically that Sodexo viewed CUPE's presence as a direct threat to the "price arrangement" between Sodexo and the Hospital. On July 9, 2008, Sodexo General Manager Paul Porteous hand-delivered a letter signed by Mr. Porteous to all the Sodexo employees that were the subject of CUPE's organizing drive at the JCC. The letter was Sodexo's response to promises that CUPE had been making regarding significant wage increases for Sodexo employees if they voted for CUPE. Sodexo recognized that if CUPE was certified as bargaining agent and sought and negotiated significant wage increases, the cost of those wage increases would be borne by Sodexo. Sodexo prepared the letter of July 9, 2008 without any input from the Hospital and distributed it to its own employees. It read as follows:

> Dear Employee,
>
> RE: CUPE Certification Vote and You
>
> As you are aware there has been an application by CUPE to become your trade union representative in place of your current representative, LIUNA. A vote to determine this issue will be held tomorrow as posted on the bulletin boards.
>
> The Company respects your right to make a choice and strongly encourages you to attend the vote. It will be a secret ballot administered by the Ontario Labour Relations Board. No one will know whether you voted for or against CUPE. You should not feel threatened by CUPE or anyone else to vote a certain way.
>
> We are writing this letter because we feel this vote is very important to you and to your future with our Company.
> As you are aware, Sodexo operates in a bid business. That is, Sodexo bids on a contract to provide services based on a certain price. If Sodexo's bid is accepted, the terms of the bid are agreed upon in a contract. In the case of the Hospital, the Hospital has agreed to pay a certain price and we make a commitment to provide service for that price.

> CUPE has made promises of significant wage increases if you vote for them. This had led some people to ask "how can CUPE promise these wage increases in this environment?" That is a very good question. The answer is that keeping these promises would be very difficult. Wage rates are, in large part, dictated by the terms of the commercial contract. When Sodexo bargains with any trade union, whether it be CUPE LIUNA or other union [*sic*], we must keep in mind what the client is willing to pay. If the wage rates are too high, and the client is not prepared to increase its [*sic*] contract price, then the commercial contract may be put into jeopardy. Either party to the contract – Sodexo or the Hospital – can provide 90 days, notice [*sic*] to terminate the contract.
>
> In our case, the Hospital has agreed to pay the wage rates we are paying you. The Hospital has no obligation to accept higher labour rates, and the Hospital has advised us it is not prepared to pay more. These are important considerations to understand when assessing CUPE's promises about wage increases. You are clearly free to choose any union you want to represent you but we want you to understand all the facts before you cast your vote. CUPE cannot guarantee you significant wage improvements. Wage rates are subject to collective bargaining. If we are not able to provide competitive services under the terms of our commercial contract with the Hospital, there certainly are other competitors eager to take our place who would not be obligated to rehire you or recognize CUPE, LIUNA or any other union.
>
> We trust you see how important it is you understand all the facts. If you have any questions we encourage you to speak to your Supervisor.
>
> Sincerely,
>
> Paul Porteous
> General Manager

24. On or about July 16, 2008, after CUPE had re-commenced its organizing campaign (having withdrawn its original application for certification on July 10, 2008), LIUNA, in response, posted a notice in the room where all Sodexo cleaners are required to sign in and out. The notice provided as follows:

> ATTENTION!!!
>
> Do NOT sign another card for CUPE!!!
>
> You are NOT required to sign another one!
>
> Do NOT let them fool you again!
>
> We can negotiate with SODEXO to get you a better wage
> SOON!

25. Brenda Berry was Sodexo's Unit Manager in charge of the JCC cleaners. She discovered that LIUNA's posting had been altered by what she described as a "derogatory" or "defamatory" statement. Ms. Berry removed the "defaced" notice and replaced it with a clean one. When the clean notice was

subsequently removed, Ms. Berry again replaced it with another clean one. This happened several times. Finally, Ms. Berry reposted the notice with a handwritten inscription, authored by her, instructing employees as follows: "Do Not Remove or Vandalize – Management."

26. Ms. Berry testified that she had engaged in the conduct described above without reading LIUNA's notice or the comments that she herself described as "derogatory" or "defamatory" She further testified that she wrote "Do not Remove or Vandalize – Management" on the notice because she felt that it was not appropriate for employees to deface or remove a notice that LIUNA had a right to put up on the bulletin board. Under the terms of the collective agreement, Sodexo had agreed to provide a bulletin board on which LIUNA was entitled to post notices. Ms. Berry testified that the issue of postings on the bulletin board had been discussed in the past at staff meetings. Her position was that staff had a right to view a communication from their union without others writing comments on the notices.

27. Dave Murphy, on behalf of CUPE, testified that he considered the notice to be LIUNA propaganda that he expected in the course of CUPE's organizing campaign. There was no direct evidence one way or the other regarding whether any employees read the LIUNA notice or the subsequent copies posted by Ms. Berry, although Mr. Murphy's testimony was that unspecified employees brought it to his attention. CUPE did not complain about Ms. Berry's activities in relation to the LIUNA notice (or, for that matter, the earlier Porteous letter) until approximately nine months later, when it filed the section 96 application following the mass layoff of the Sodexo cleaners.

28. In August 2008, Sodexo granted employees in the three bargaining units affected by CUPE's organizing drive a wage increase of $2 per hour (to $11.50/hour) effective September 1, 2008, with a further $0.50/hour increase promised to take effect in January 2009. The employees were informed of the wage increase by way of a Memorandum from LIUNA, dated August 19, 2008, which provided as follows:

> LIUNA has been working diligently with your Employer to secure improvements at your workplace.
>
> LIUNA has the pleasure to announce all members employed by Sodexo at Hamilton Health Sciences (General, Henderson, JCC) will effectively receive the following rates:
>
> **$11.50 per hour as of September 1, 2008**
> **$12.00 per hour as of January 1, 2009**
>
> Please be advised that LIUNA will continue in its efforts to improve your workplace and if there are any concerns or questions, feel free to contact me anytime at 905.529.1116.
>
> In Solidarity,
>
> Dave

29. The wage increase was announced after CUPE's first failed application for certification in July 2008 but before its second, ultimately successful, application was filed on August 22, 2008. However, there was evidence led through Brian Kimmett that both Sodexo and LIUNA had concerns about wages before CUPE even filed its first application for certification in the summer of 2008. According to Mr. Kimmett, Sodexo had internal discussions regarding potential wage increases for the employees

represented by LIUNA. These internal discussions, he said, were triggered in part by the pending increase to the minimum wage that would take effect in March, 2009. According to Mr. Kimmett, Dave Finnerty of LIUNA had also approached Sodexo and raised the issue of a wage increase in light of the upcoming increase to the statutory minimum wage. Sodexo had concerns about retention and turnover that might occur as a result. It also was concerned, Mr. Kimmett testified, about a gap in wages of Sodexo employees at different sites of the Hospital. Finally, Mr. Kimmett acknowledged that one of the reasons for giving the wage increase was that Sodexo had a stable relationship with LIUNA which Sodexo was interested in maintaining.

30. Sodexo made its decision to grant an increase without any involvement of the Hospital. The pay increase was granted to LIUNA employees effective September, 2008 – an increase to $11.50 per hour, and then an increase to $12.00 per hour effective January 1, 2009. These pay increases were implemented and paid by Sodexo.

31. Sodexo advised the Hospital of its decision and its justification in two pieces of correspondence. In a letter dated August 25, 2008, Mr. Kimmett wrote in part:

> ...As you are aware, Sodexo's employees working at these hospitals are currently members of LIUNA and have been raided by CUPE.
>
> CUPE filed for certification and, after a number of challenges by Sodexo and LIUNA, withdrew their certification application. As of August 22, 2008, CUPE has re-applied for certification. There will be another formal vote to determine which union represents our employees.
>
> As CUPE withdrew its original application for certification, Sodexo negotiated a new wage structure with LUINA [*sic*]. While the new wage structure has considerable cost increases, it is less than one-quarter of the increase associated with an arbitrated award granting hospital-style wage and benefit plans.
>
> ...We made this adjustment to maintain positive employee relationships while taking into consideration upcoming increases in the minimum wage laws. This is an attempt to strike a balance, which will allow Sodexo to continue to be a competitive service provider for our clients.

32. On September 24, 2008 Mr. Porteous wrote a similar letter to Ms. Carson requesting the Hospital's support for a comparable wage increase at the Chedoke and MUMC sites (represented by OPSEU), in which he stated in part:

> ...Sodexo believes there is advantage in negotiating a new wage structure with OPSEU to align itself with the Henderson and General pay rates. While the new wage structure has considerable cost increases, it is less than one-quarter of the increase associated with an arbitrated award granting hospital-style wage and benefit plans.
>
> We believe we will need to standardize our rates across all sites of Hamilton Health Sciences to avoid a raid by CUPE at the McMaster and Chedoke sites. This is an attempt to strike a balance, which will

> allow Sodexo to continue to be a competitive service provider for our clients…

33. The Hospital initially declined Sodexo's requests to defray the costs of the wage increase. Sodexo was not deterred. The issue was discussed at a meeting between HHS and Sodexo representatives on October 16, 2008. At this stage, CUPE's displacement application for certification at the JCC and the other two sites had not yet been determined. As recorded in Ms. Carson's meeting notes, Sodexo advised the Hospital that, as of that date, there was "no ruling from Labour Board re: CUPE/LIUNA vote at Henderson and General" and it is "CUPE['s] strategy to refer to HILDA [*sic*] in support of essential services and wage parity with hospital workers" and it is "CUPE['s] goal to 'take over' healthcare sector."

34. In her cross-examination, Ms. Carson confirmed that after the October 16, 2008 meeting, she fully appreciated that CUPE was likely to request Hospital wage rates, which would "defeat the entire business case" of Sodexo's arrangement with the Hospital, and that Sodexo required the Hospital's support for the wage increase to avoid such a result.

35. Subsequently, Ms. Carson, with the assistance of Louise Taylor Green (the Hospital's Vice President of Human Resources), prepared a memorandum for the Hospital's corporate management team which weighed the risks and benefits of granting the requested contract price increase. The undated memorandum stated in part as follows:

> In an attempt to avoid CUPE representation, Sodexo negotiated a new labour [*sic*] rate with LIUNA effective Sept. 1, 2008. It is important to note at this point that CUPE has a possible agenda to secure all healthcare workers in Ontario and move forward with the argument that they fall under the HLDA legislation and are therefore entitled to the same wages as hospital employees
>
> On January 1, 2009, the same window of opportunity opens for CUPE to raid OPSEU at McMaster and Chedoke. Sodexo has already received notice from OPSEU that they wish to meet to discuss wage rates. It is expected that they will request at least wage parity with LIUNA. This stand on their part may also signify that they are prepared to fight CUPE.

36. The memorandum goes on to recommend "preservation of the partnership with Sodexo by agreeing to increase the labour rate (cost per hour worked) retroactively to September 1, 2008 provided we can effectively negotiate a zero inflation factor for 2009 and reducing current costs annually by $265,000…"

37. On January 14, 2009, about a month after CUPE's successful displacement application for certification at the JCC, and its defeat at the Henderson and General sites, the Hospital agreed to increase the contract price in respect of all three sites, retroactive to the date of the wage increase. In order to offset the increase in price, Sodexo and the Hospital agreed to some reductions in cleaning and hours and Sodexo agreed to forego an inflationary increase. Sodexo absorbed the incidental costs associated with a wage increase, such as the increase in Sodexo's Workplace Safety and Insurance Board premiums resulting from the increase in its payroll.

38. Had the Hospital not agreed to cover the increase in the wages, then Sodexo would have had to consider bearing the increased cost itself, possibly running a deficit, or cancelling the contract covering the three sites. For her part, Linda Carson testified that she knew Sodexo could not continue to operate in what she believed was a deficit situation and was aware of the risk that Sodexo could terminate its contract at all of the affected sites. Ms. Carson did not believe that Sodexo could easily and safely be replaced. As detailed in her memorandum referred to in paragraph 35 above, the replacement of Sodexo with another contractor would involve a "[l]engthy transition period and learning curves impacting service to approx. 75% of building space"; that "[c]leaning standards will decline in transition period with risk of increased outbreaks" and that it would be "[u]unlikely that another company can support volume of business therefore we may have to find multiple alternate providers (by site)."

39. Before leaving this section dealing with the CUPE organizing campaign and related events, it bears noting that in written presentation materials that Sodexo prepared for its annual "Clients for Life" meeting with the Hospital held on March 25, 2009 (around the time the Hospital was considering termination of Sodexo's subcontract at the JCC), Sodexo listed among its "accomplishments" in December 2008 that it "[s]successfully diverted union [i.e. LIUNA] decertification [i.e. by CUPE] at Hamilton General Hospital and Henderson General Hospital."

40. The next and final major event in the recitation of the facts concerns the collective bargaining between CUPE and Sodexo and the Hospital's decision to end its relationship with Sodexo at the JCC. However, before I move on to those events, I describe the Management Agreement between Sodexo and the Hospital, as well as the circumstances under which the Hospital's cleaning function was carried out in practice.

The Management Agreement and the performance of Hospital cleaning

41. Paul Porteous testified that when he was asked to provide a quote to the JCC he first did a business analysis. To decide price he considered the square footage to be cleaned, the number of cleaning hours required and other anticipated costs and then built in some profit for Sodexo. Mr. Porteous determined the number of hours of cleaning that would be required annually using his experience and considering factors such as staffing patterns for the building, area types, and current operational issues. Mr. Porteous determined that it would require 22,871 hours. He arrived at an annual contract price of $391, 287.00.

42. Once the JCC accepted Mr. Porteous' quote and Sodexo began performing the work, Mr. Porteous invoiced the JCC based on Sodexo's 5-4-4 system. He divided the annual cost by 52 weeks, and then invoiced the JCC based on the number of weeks in the billing period. Accordingly, Sodexo billed the JCC an amount of $37,623.75 for a 5 week period.

43. The form of the invoices subsequently changed. Specifically, Sodexo began to break down the cost by identifying an amount for labour, management and supplies. The form of the invoices changed again after the Hospital requested a more detailed breakdown.

44. The witnesses for the responding parties confirmed that the 2003 version of the Management Agreement (as modified by the June 24, 2004 Amendment and the arrangements particular to the JCC), defined the legal and financial arrangements between the Hospital and Sodexo at all times relevant to these applications.

45. The Management Agreement provided that "the Client [i.e. HHS] retains Sodexo to manage and operate Client's Core Housekeeping Services for Client's patients, residents, employees, visitors and guests at the Premises" (Article 1.1.).

46. Sodexo was responsible under the Management Agreement to clean the Hospital to the Hospital's specifications. Sodexo was "responsible for providing a service that meets or exceeds the expectations of HHS and standards for environmental cleanliness" and, in this connection, a broad and detailed array of Sodexo's cleaning operations, as well as the tracking and assessment of Sodexo's work performance, are made the subject of "deliverables" (Article 3). The Hospital had the right to monitor and evaluate Sodexo's adherence to these "deliverables", and to this end, the Hospital was entitled to access to Sodexo's corporate programs and resource support as committed in this agreement" (Article 4) and Sodexo was to "provide a data based reporting system for the deliverables for review by HHS at least semi-annually or as otherwise requested by HHS" [for the purpose of] "future evaluation of Sodexo's performance" (Article 13).

47. The Hospital was required to provide "suitable office space for use by Sodexo's supervisor and storage space for supplies and equipment" (Article 4). The Hospital was also obligated to "provide Sodexo with the appropriate number of computers and related equipment for provision of Services (Article 4.5(j)).[3]

48. In addition, while not specifically set out in the Management Agreement, Sodexo supplied the Hospital with a relatively permanent workforce. Sodexo cleaners and their front-line managers were assigned to the Hospital on a long-term basis; they were not temporary replacement workers dispatched to clean the premises of Sodexo's other clients from time to time.

49. As I have indicated, the contract price at the JCC included three components: labour, supplies and management. The labour component included the number of labour hours per month that were required to clean the JCC, multiplied by a fixed hourly rate that included the actual hourly wage paid to Sodexo cleaners. The labour component also included Sodexo's monthly management fee. The supply component consisted of the monthly number of labour hours required to clean the JCC multiplied by a pre-determined "hourly" supply rate. The management component was the estimated monthly number of management hours multiplied by the cost per hour of managing the JCC.

50. The cost of equipment was also included in the contract price. In his testimony, Mr. Porteous confirmed that a one-time $31,000 capital investment in cleaning equipment, while initially defrayed by Sodexo, was amortized over a period of five years and included in the contract price. Any subsequent costs related to the purchase and maintenance were built into the hourly rate, according to correspondence authored by Mr. Porteous on or about May 28, 2004, in which he stated that "[a]n ongoing budget of equipment maintenance and equipment purchase will be incorporated into your [the JCC's] hourly rate."

51. The evidence was not entirely clear as to whether or not Sodexo could bill the Hospital for unanticipated labour costs exceeding the monthly budgeted allocation. There was no provision in the Management Agreement to that effect, nor was there any evidence that such a situation had ever arisen.

---

[3] In fact, Ms. Berry confirmed that Sodexo purchased or leased two computers from the Hospital. These computers were serviced by the Hospital's IT department, and made use of the Hospital's server to access the internet and to access the Hospital's secure intranet system, where the Hospital's policies were located. Ms. Berry was assigned a Hospital e-mail address that she used for her dealings with the Hospital.

There was, on the other hand, evidence of a one-time event in which Sodexo reduced the contract price to reflect a vacancy in one of the supervisor positions assigned at the Hospital.

52. Under the Management Agreement, HHS assumed the risk of certain variable costs related to Sodexo's operations at the Hospital, including: increases to the provincial minimum wage, increases in statutory employment deductions and increases to the costs of paper and plastic.

53. Sodexo managers exerted front-line control over the Sodexo cleaners. However, the Management Agreement required Sodexo to consider the Hospital's employee policies and practices when establishing policies and practices for Sodexo employees (Article 2.3). It also specifically provided that Sodexo's Orientation and Training Program "will include…orientation to HHS, it's [*sic*] mission and values." (Article 1). Ms. Berry testified that Sodexo employees were trained, together with cleaners directly employed by the Hospital, on the Hospital's infection control procedures by infection control experts from HHS, but that appears to be the only example of combined training of the staffs of the two entities. In all other respects, their training programs were independent of one another.

54. The Management Agreement prescribed the posting of Sodexo employee schedules ("duty lists") and provided that "these duty lists would be available for review at HHS management's request" (Article 2). It also permitted the Hospital "the opportunity to provide feedback into probationary and annual performance appraisals conducted by Sodexo for their employees" (Article 5D). Moreover, according to the Management Agreement the Hospital was entitled to request removal of any Sodexo employee (Article 4.4 and Article 7B). However, there was no evidence that the Hospital had, in fact, ever requested the removal of a Sodexo employee, or for that matter, reviewed Sodexo's duty lists or provided feedback with respect to performance appraisals conducted by Sodexo in regard to its cleaners.

55. Sodexo employees were required to wear identification badges "issued by the hospital" (Article 9). These badges bear the Hospital's logo as well as Sodexo's name. Further, all Sodexo staff must comply with "the HHS Personal Appearance Policy" (Article 10).

56. The Management Agreement contained provisions setting out the relationship of Sodexo's management staff with the Hospital. For example, it stated that "Sodexo's Housekeeping Services Manager shall function and be recognized as a department head in Client's [i.e., the Hospital's] facility and shall perform in accordance with Client's department head practices and written policies and procedures" (Exhibit B, Article 2.2 A). The Hospital was entitled to interview and approve all individuals selected by Sodexo for management positions prior to their commencement of work on the Hospital's premises. (Exhibit B, Article 5A). Indeed, Ms. Berry admitted in cross-examination that she was interviewed by Linda Carson upon her assignment by Sodexo to the JCC. However, that was the only direct evidence of HHS conducting such an interview of a Sodexo employee.

57. Finally, the Management Agreement provided that either party was entitled to terminate the Agreement for cause or without cause on 60 days notice (Articles 3.1 and 3.2).

***

58. I turn now to a description of the relationship between Sodexo and HHS in terms of its day-to-day functioning.

59. Sodexo controlled the recruiting and hiring of Sodexo cleaners at the JCC. The Hospital had no direction or control over the qualifications or certifications required of Sodexo employees; the Hospital

had no involvement in interviews conducted by Sodexo when Sodexo was hiring its own employees; and the Hospital played no part in conducting reference or background checks of job applicants being considered by Sodexo. The Hospital never attempted to dictate the number of employees employed by Sodexo, or whether those Sodexo employees were full-time, part-time, casual, on-call, etc. These were matters exclusively determined by Sodexo. That being said, Ms. Carson on behalf of HHS, contemplated (but ultimately ruled out) the possibility of requesting Sodexo to combine a couple of management positions and eliminate three project cleaners as a means of offsetting the Hospital's cost of absorbing the $2.00 wage increase.

60. As I have indicated, the Hospital did play a limited role in the selection of Sodexo management at the JCC, and the Management Agreement required Sodexo's managers to perform their duties in accordance with the Hospital's department head practices and written policies and procedures. There was no evidence, however, as to the extent, if any, that Sodexo managers were restricted or constrained by HHS practices, policies or procedures applicable to Hospital department heads.

61. Sodexo had sole control over job postings and advertisements, reviewing applications, interviewing, checking references, making employment offers and arranging for newly hired employees' first day of work. Sodexo's advertisements and postings for positions at the JCC always identified Sodexo as the employer. Applicants completed a Sodexo application form.

62. Ms. Berry would screen resumes from external candidates to determine if they had suitable experience and knowledge. Ms. Berry followed Sodexo's guidelines for interviewing front line employees.

63. Newly hired Sodexo employees would receive an orientation from their Sodexo manager on their first day of work. The Sodexo manager would follow the Sodexo Orientation Checklist. Employees would be provided with Sodexo's documentation, including Sodexo's policies on sexual harassment, whistle blowing and Sodexo's customized Employee Handbook. Sodexo also provided new hires with health and safety training, reviewing Sodexo's policy on Health and Safety, and the lock-out, tag-out procedure. In addition, Sodexo would review Sodexo's policy on the right to refuse work and concerning WHMIS.

64. In managing the work of Sodexo employees at JCC, Sodexo's managers were governed by Sodexo's own policies, practices and procedures that applied exclusively to Sodexo employees. These policies, practices and procedures were supplemented by and subject to the terms of Sodexo's collective agreement with LIUNA. Notwithstanding the Management Agreement, Sodexo never revised or amended its employment policies and practices at JCC to bring them into conformity with the Hospital's policies and practices. Nor was Sodexo ever asked by the Hospital to do so. Sodexo did ensure that its employees respected the Hospital's policies that were location-specific (e.g., infection control policies, etc.).

65. Sodexo managers dealt with the Sodexo employees directly through LIUNA, if any issues arose with respect to those employees (e.g., performance issues). If Sodexo's managers had any questions or concerns about how to proceed, they would contact Sodexo Human Resources located in Burlington, Ontario for guidance. The Hospital's Human Resources played no role in respect of Sodexo's employees at the JCC, and the Hospital's managers had no training in respect of Sodexo's employment policies, practices and procedures.

66. All disciplinary decisions regarding Sodexo employees at JCC were made directly by Sodexo, based on Sodexo's policies and the collective agreement with LIUNA. On occasion, Sodexo's managers would consult with Sodexo Human Resources before any disciplinary actions would be taken against Sodexo employees.

67. Ms. Berry disciplined a number of employees. Ms. Berry was not aware of the Hospital ever disciplining a Sodexo employee. Ms. Berry testified that the Hospital had never asked her to discipline a Sodexo employee or terminate a Sodexo employee. Linda Carson also testified that she was not aware of the Hospital disciplining a Sodexo employee or asking that Sodexo discipline or terminate a Sodexo employee. As I have indicated above, there was no occasion when the Hospital requested the removal of a Sodexo employee working at JCC, although it had the right to make such a request pursuant to the Management Agreement.

68. In the event of a grievance from LIUNA concerning the discipline of a Sodexo employee, the grievance would have been handled at all stages by Sodexo managers and Sodexo Human Resources. The Hospital would have played no role in such grievances. Sodexo had its own Human Resources policy on grievance handling and investigation that was available on the Sodexo intranet.

69. Sodexo's head office produced and issued training "kits" periodically. These kits would be used by Sodexo's managers to train Sodexo's employees at JCC on particular issues, such as substance abuse and slips and falls. Sodexo had mandatory training sessions that would have to occur over 12 month periods and these would be monitored by the Manager. Sodexo managers would perform the training, or they would arrange to bring in vendors from time to time to do it. Sodexo paid for the costs of such training.

70. Sodexo kept records of the training in software called Gold Check, which was purchased by Sodexo. It allows Sodexo to see at a glance who has had what training, or look at all employees to see all training that Sodexo had provided. Sodexo owned the Gold Check software, and a Sodexo manager inputted the information using the software.

71. Sodexo would conduct monthly training of its employees and provide quizzes to make sure they understood its expectations and the Ministry's requirements.

72. Sodexo and the Hospital had separate health and safety committees at the JCC. Sodexo's Joint Health and Safety Committee at the JCC was composed only of Sodexo employees and managers and represented only Sodexo staff. Neither Hospital management nor Hospital employees had any involvement in the Sodexo Joint Health and Safety Committee. Furthermore, neither Sodexo management nor Sodexo employees had any involvement in the Hospital's health and safety committee. Minutes of Sodexo's Joint Health and Safety Committee meetings were posted in the workplace. The Sodexo Committee would conduct monthly inspections at the site. Records of safety inspections were kept on Sodexo's Health and Safety bulletin board in the Sodexo sign in and sign out room.

73. Sodexo had its own Health and Safety Policy, which was provided to Sodexo's own employees, but not to the Hospital's employees. Sodexo also had a Sodexo Management Health and Safety Policy and Safety Policies and Procedures that were used by Sodexo staff.

74. Sodexo maintained its own WSIB account. If a Sodexo employee suffered a workplace injury at JCC, then Sodexo managers would complete the required WSIB paperwork and then call it in to the

Sodexo 1-800 number. Sodexo has its own manager for WSIB located in Sodexo's Corporate head office in Burlington.

75. Sodexo and Hospital employees cleaned separate, defined areas of JCC. Hospital and Sodexo staff worked in the same building, probably saw each other as they worked in their clearly defined areas and probably passed by each other in the process of moving around the JCC site. However, they were not assigned to clean the same area or to engage in joint cleaning efforts.

76. Sodexo controlled the scheduling of its own employees. Sodexo prepared the job duty list that was followed by Sodexo employees. Sodexo also prepared the duty schedule. Sodexo was free to change the hours of work of its employees, to use part-time instead of full-time employees, or to organize its workforce however it wished. Sodexo created a four-week schedule that was put up at least two weeks prior to conclusion of the previous schedule and was broken into full-time, part-time and on-call. The Hospital did not have any input into Sodexo's schedule.

77. Sodexo employees had their own sign-in sheet and took their breaks at times determined by Sodexo. When Sodexo employees wanted to change their schedule or request time off, they had to complete a Sodexo time off request form, which would be approved by a Sodexo supervisor or manager.

78. Sodexo maintained comprehensive paper and electronic personnel files for its own employees that included payroll and benefit records, banking information, enrolment forms, tax information and disciplinary records. The Hospital did not have access to this information.

79. Sodexo had its own payroll software, Capta, and a payroll administrator. The payroll administrator would send the payroll to Sodexo's head office, which would then send it to a third party that processed payroll for Sodexo employees. The computer used for payroll was not connected to the Hospital's computer system. Earning statements and T4s for Sodexo employees were all issued by Sodexo and clearly identified Sodexo as the employer.

80. Sodexo deducted LIUNA union dues from Sodexo employees and remitted them to LIUNA.

81. Sodexo administered the vacations of Sodexo employees.

82. If a Sodexo employee at JCC resigned from employment, Sodexo would prepare the required record of employment for the employee. Sodexo also had its own personnel action forms that it used in certain circumstances where employees resigned or their status changed.

83. Sodexo provided the employees at JCC with their own uniforms that were distinctly different from uniforms worn by employees of the Hospital. Sodexo uniforms had a Sodexo logo on the shirt, vest, coat and toques. Sodexo also provided its employees with name tags that identified them as Sodexo employees. The name tag had the Hospital's logo, but had the name Sodexo below the employee's picture.

84. Sodexo provided employees with their own swipe cards that were used in Sodexo's time accounting system. Sodexo employees had to swipe the Sodexo time cards prior to their shift and at the end of their shift. Sodexo owned the equipment used to swipe in and out. Sodexo also implemented a manual sign in and sign out sheet so that it would know who was physically in the building.

85. Sodexo managers completed the performance reviews. As I have indicated, there was no evidence that the Hospital provided feedback or had any input into the performance reviews.

86. In 2008, Sodexo purchased a Morse Canada key system for use at the JCC and Henderson. This is a key watch system that allowed Sodexo to monitor and secure its keys. It was used only by Sodexo employees.

87. Sodexo had its own harassment-free workplace policy and policy against sexual harassment. In the event a Sodexo employee filed a harassment claim against another Sodexo employee, they would use the Sodexo policy and Sodexo would deal with it directly. Sodexo would only notify the Hospital of a harassment complaint if the complaint was against a Hospital employee.

88. Sodexo has DVDs and manuals regarding cleaning standards, processes, methodologies and frequencies. When cleaning, it met or exceeded the guidelines of the Ministry of Health, which were adopted by the Hospital as its standards of cleanliness. Ms. Berry testified that she never witnessed anyone from the Hospital inspecting the cleaning that Sodexo performed.

89. Sodexo conducted two different audits of its cleaning. One was conducted by another Sodexo location, and the other was conducted by an independent agency that Sodexo retained and paid.

90. Sodexo was responsible for ordering all supplies used by its employees and providing them with the necessary equipment to perform their duties. Sodexo ordered and paid for the cleaning supplies used at the JCC. Sodexo maintained the equipment and paid an outside agency for any necessary repairs. Sodexo purchased and owned the Quick Click Dispensing System that was installed in the JCC for use by Sodexo employees.

Collective bargaining in 2009 between CUPE and Sodexo, and its aftermath

91. On January 5, 2009, after being certified the previous December to represent Sodexo housekeepers at the JCC site, CUPE provided Sodexo with notice to bargain a first collective agreement.

92. On March 19, 2009, the parties met to exchange proposals. CUPE proposed Hospital rates as base wage rates for the JCC bargaining unit, with a further general wage increase proposal to be tabled during the bargaining process. CUPE's wage proposal contemplated an increase effective December 18, 2008 with a starting salary of $19.476 after one year, $19.658 after two years, $19.849 after three years. The general wage increase was not specified but it was to be calculated on top of the proposed hourly rates. CUPE's proposal was for an initial wage increase of over $7.00 an hour or over 60% before any general wage increase had been tabled. CUPE also sought to introduce a short-term sick leave plan, separation allowances, pregnancy and parental leave top-up, improved overtime entitlement and many other benefits with cost implications.

93. For its part, Sodexo submitted LIUNA's collective agreement, absent the cover page and the wage schedule, as its non-monetary proposals. Sodexo did not make a monetary proposal.

94. The parties adjourned collective bargaining for the day because Sodexo representatives indicated that they needed time to review the CUPE proposal. As the parties were leaving, CUPE's National Representative, Cheri Dobbs advised Mr. Kimmett that CUPE would be applying for conciliation.

95. That afternoon (March 19, 2009), Mr. Kimmett telephoned Linda Carson, the Hospital's Director of Customer Support Services. Mr. Kimmett testified that he advised her of CUPE's wage proposal and impending application for conciliation. He told Ms. Carson that he anticipated a significant price adjustment to the Management Agreement based on at minimum, a $5.00 per hour wage increase. He said the reason he called Ms. Carson was because he felt it was appropriate to give a client a warning of a significant price increase. According to Mr. Kimmett, Ms. Carson replied that she would take this information under advisement and get back to him. For her part, Ms. Carson recalled that Mr. Kimmett told her that the Hospital should anticipate at least a $5 per hour imminent increase in the contract price, over and above the $2 increase which the Hospital had agreed to absorb, as a result of the change in Sodexo's union and the wage increase proposed by the new union.

96. On March 23, 2009, CUPE applied for conciliation and indicated on the application that the governing statute was the *Hospital Labour Disputes Arbitration Act*. There was no evidence that Sodexo disputed CUPE's application for conciliation.

97. By March 27, 2009, Ms. Carson had discussed CUPE's wage proposal with Hospital senior management and the Hospital had decided to terminate its arrangement with Sodexo in respect of the JCC. On March 27, 2009, Ms. Carson prepared a draft response to Mr. Kimmett explaining the Hospital's decision as follows:

> Dear Mr. Kimmett:
>
> Thank you for informing me of the recent wage proposals from CUPE for the Sodexo staff currently employed at the Juravinski Cancer Center.
>
> Hamilton Health Sciences cannot support such a substantial cost increase for the services provided. As a result, I regret to inform you that we are effective immediately serving 60-day notice of cancellation of the contract pertaining to the JCC as required.
>
> We appreciate your support as we work through the disengagement process.

98. Ms. Carson then sent the draft response to the Hospital's Purchasing Department for their review. The revised letter, which was ultimately sent to Mr. Kimmett on March 27, 2009, read as follows:

> Dear Mr. Kimmett,
>
> This letter will serve as your 90 day written notice for termination on the contract that is currently in place at Hamilton Health Science for services performed at the Juravinski Cancer Centre. Hamilton Health Sciences cannot support such a substantial cost increase for the services provided as outlined by you.
>
> We appreciate your support as we work through the disengagement process.

99. Ms. Carson testified that the reason for terminating the contract with Sodexo was that the Hospital had exhausted all options to avoid the impact of the previous $2/hour increase, and there was no other means to sidestep a further $5/hour increase, particularly in a year in which the Hospital had undertaken to find $25 million in overall organizational savings. Mr. Kimmett admitted that he was not surprised by the Hospital's decision, as this was the outcome that Sodexo had predicted in its July 9, 2008 letter to its employees in which it cautioned its staff to consider the implications of CUPE's wage increase promises.

100. On or about March 30, 2009, Ms. Dobbs was advised of the contract termination by Sodexo representative Nick Resetar. Later on that afternoon, Sodexo provided all JCC cleaners with notice of layoff, effective June 28, 2009. Sodexo employees at the Hospital's other sites (i.e. where CUPE did not have bargaining rights) were not laid off.

101. Several days later, Ms. Dobbs had a telephone discussion with Mr. Kimmett. According to Ms. Dobbs, Mr. Kimmett indicated that while he did not know for certain why the Hospital had provided notice of termination, he believed it was because the Hospital disapproved of the $2/hour wage increase that Sodexo had granted in August 2008. Mr. Murphy, CUPE's Interim President at the time, arranged a meeting with Ms. Carson to obtain more information about the reasons for the Hospital's decision. He brought along Ms. Dobbs on April 2, 2009. In the meeting, Ms. Carson confirmed that the reason for the Hospital's decision to end the arrangement with Sodexo at the JCC site was that Ms. Carson had received a telephone call from Mr. Kimmett advising of an "imminent price increase" anticipated as a result of collective bargaining with CUPE. According to CUPE's witnesses, Ms. Carson further indicated that if Sodexo could prevent this price increase, then the Hospital would rescind its notice of termination. For her part, Ms. Carson testified that all she conveyed to Ms. Dobbs and Mr. Murphy was that if anything changed, the Hospital would remain flexible. In any event, Ms. Dobbs and Mr. Murphy say they took Ms. Carson to mean that if CUPE were to withdraw its wage proposal, the Hospital would rescind its notice of termination of contract with Sodexo.

102. According to Ms. Dobbs, Ms. Carson confirmed that the Hospital's decision to terminate its arrangement with Sodexo at the JCC site was not due to the $2/hour wage increase that Sodexo had provided to housekeepers at the JCC, General and Henderson sites during CUPE's organizing drive seven months prior. Rather, it was the further "price increase" anticipated as a result of CUPE's wage demands at the JCC that formed the basis for the Hospital's decision.

103. As for the $2/hour wage increase, Ms. Carson advised that Sodexo had, at that time, approached the Hospital asking for a "price increase" sufficient to cover the $2/hour wage increase; that Ms. Carson had relayed this request to her senior manager; and that the Hospital specifically approved the request. Ms. Carson explained that normally, the arrangements between the Hospital and Sodexo leave no room for wage increases beyond inflation increases. However, an exception was made in the case of the $2/hour wage increase request, as the Hospital had taken cost-saving measures to defray the costs associated with that request.

104. Ms. Carson explained to Ms. Dobbs and Mr. Murphy that, but for the imminent price increase, it would have been the Hospital's preference to deal with one cleaning contractor – Sodexo – at all of its sites. In this regard, Ms. Carson revealed that the Hospital's outsourcing arrangement with Sodexo results in considerable cost savings to the Hospital, owing to Sodexo's significant buying power in respect of cleaning equipment and supplies, as well as reduced labour costs.

105. According to Ms. Dobbs, throughout the meeting, Ms. Carson repeatedly asked Ms. Dobbs and Mr. Murphy how collective bargaining with Sodexo was going. In her evidence, Ms. Carson said she did not believe she would have made such inquiries.

106. After providing Sodexo with notice of termination, the Hospital issued a Request for Proposals ("RFP") for the cleaning of the JCC site. In the RFP, HHS explained that the termination of its arrangement with Sodexo was the result of a significant cost increase in the contract.

107. The contract for the cleaning of the JCC site was eventually awarded to Innovative Cleaners, a non-unionized subcontractor.[4] Approximately 90% of the cleaners hired by Innovative to clean the JCC were former Sodexo cleaners from the JCC site.

108. Meanwhile, CUPE and Sodexo met for a second time in conciliation in May, 2009. Sodexo indicated that it was not inclined to participate in collective bargaining as there was not much time left in its contract with the Hospital. Sodexo offered to settle the negotiations by offering the members $500 each. This offer was rejected by CUPE.

109. Subsequently, a no-Board report was issued on May 19, 2009 and on June 9, 2009, CUPE requested a first contract arbitration. However, neither party has attempted to move the matter forward.

The Positions of the Parties

110. Counsel for each party made extremely thorough, detailed and thoughtful oral and written arguments for which I am very grateful. For the purposes of expedition, what follows is a mere sketch of the salient features of their positions which I acknowledge does not capture the richness of those arguments.

CUPE's Position

111. CUPE submits that the Hospital and Sodexo are related employers within the meaning of subsection 1(4). The Hospital and Sodexo, CUPE contends, carry on related or associated activities or businesses with respect to cleaning operations at the Hospital. In this regard, Sodexo cleans the Hospital, according to the Hospital's specifications, for the benefit of the Hospital's patients, staff and guests.

112. CUPE further submits that the Hospital and Sodexo are under common control and direction. Sodexo lacks the markers of independence in its relationship with the Hospital that would place it in the category of "independent subcontractor" (i.e. "'legitimate' subcontractor") *vis a vis* the Hospital. Sodexo lacks the control and independence that would make it a "legitimate" subcontractor for the purposes of s. 1(4). In particular, CUPE contends that:

> **(i) The Hospital and Sodexo's operations are permanently interrelated;**
>
> **(ii) The Hospital bears the ultimate burden of remuneration;**
>
> **(iii) Sodexo has virtually no risk of loss or chance of profit;**

---

[4] Although no evidence was led concerning more recent developments, it would appear undisputed that the workers of Innovative Cleaners at the Hospital are now represented by LIUNA.

(iv) The Hospital owns the "tools";

(v) Sodexo cleaners are represented to the public as being part of the Hospital; and

(vi) The Hospital and Sodexo share direction and control over Sodexo's cleaners and front-line managers.

113. Not only does the outsourcing arrangement between the Hospital and Sodexo demonstrate that control and direction over Sodexo's cleaning operations at the Hospital are shared between the two entities, but the evidence establishes that the Hospital and Sodexo pursued a common labour relations strategy in which the Hospital and Sodexo worked together to deprive employees of their rights.

114. CUPE further contends that labour relations considerations demand that the Board exercise its discretion to make a single-employer declaration in this case. Such a declaration, says CUPE, is necessary to remedy the erosion/elimination of CUPE's bargaining rights; and to ensure that CUPE has access to the true locus of power, namely the Hospital, in determining the terms and conditions of employment of employees in the bargaining unit.

115. Counsel for CUPE referred the Board to the following case authorities in support of its position concerning the subsection 1(4) application: *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945; *PPG Canada Inc.*, 2009 CanLII 15058 (ON LRB); *Metro Waste Paper Recovery Inc. (Metro Municipal Recycling Services Inc.)*, 2009 CanLII 60617 (ON LRB); *KAS Group of Companies v. Metro Waste Paper Recovery Inc.*, 2010 ONSC 7050 (CanLII); *Federated Building Maintenance*, [1985] OLRB Rep. November 1585; *Diamond Taxicab Association (Toronto) Limited, et al*, [1995] OLRB Rep. June 753; *Thunder Bay Regional Hospital and Steeves & Rozema Enterprises Ltd.*, 2005 CanLII 38883 (ON LRB); *Etobicoke Public Library Board*, [1989] OLRB Rep. Sept. 935; *Livingston Lodge*, [1998] OLRB Rep. May/June 430; *Kennedy Lodge Inc.*, [1984] OLRB Rep. July 931; *Brantwood Manor Nursing Homes Limited*, [1986] OLRB Rep. Jan. 9, application for judicial review dismissed, unreported, June 3, 1986 (Div. Ct.), appeal dismissed, unreported, Jan. 22,1988 (C.A.); *Walters Lithographing*, [1971] OLRB Rep. July 406; *York Condominium Corporation*, [1977] OLRB Rep. October 645; *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538; *IKO Industries Ltd. and United Steelworkers of America* (2002), 118 L.A.C. (4th) 1; *Montreal v. Montreal Locomotive Works Ltd. et al.*, [1947] 1 D.L.R. 161; Re Nanaimo Regional General Hospital and H.E.U. (2001), 103 L.A.C. (4th) 193 (Hope); *Asco Construction Ltd.*, 2009 CanLII 24163 (ON LRB); *National Waste Services Inc.*, 2009 CanLII 29865 (ON LRB); *Hamilton Health Sciences Corporation*, 2009 CanLII 43368 (ON LRB); *City of Toronto and Toronto Parking Authority*, 2000 CanLII 7860 (ON LRB).

116. CUPE submits that the responding parties, acting as a single employer under 1(4) or alternatively acting in concert, committed unfair labour practices in the following respects:

- threatening Sodexo employees that voting for CUPE would result in job losses, in violation of sections 70, 72(c) and 76 of the *Act*;

- expressly endorsing LIUNA's anti-CUPE message, in violation of section 70 of the *Act*;

- providing Sodexo employees with a wage increase in order to influence employees to vote for LIUNA instead of CUPE in an upcoming representation vote, in violation of sections 70 and 76 of the *Act*; and

- terminating the entire bargaining unit for making a lawful wage proposal, in violation of sections 70, 72(a) and 72(c) of the *Act*.

117. CUPE cited the following cases in support of its contention of violations of the Act by the responding parties: *Romzap Ltd. (Sheraton Fallsview Hotel & Conference Centre)*, 1995 CanLII 10034 (ON LRB); *Plaza Fiberglas Manufacturing Limited*, [1990] OLRB Rep. February 192; *Cadillac Fairview Corporation Limited*, 1985 CanLII 1116 (ON LRB) (C.A); *Hydro One Inc.*, [2005] OLRB Rep. Nov/Dec. 969; *Belleville (City)*, 2009 CanLII 3545 (ON LRB); *Westinghouse Canada Limited* [1980] OLRB Rep. Apr. 577, application for judicial review dismissed, [1980] O.J. No. 38 (Div Court)(QL); *The Globe and Mail*, 1982 Can LII 841 (ON LRB); *Steinberg Inc. (Miracle Food Mart Division) v. The Great Atlantic and Pacific Company of Canada Limited*, [1995] OLRB Rep. October 1309; *Greenberg Stores Limited*, [1995] OLRB Rep. November 1367; *Hamilton Health Science Corporation*, 2009 CanLII 43368 (ON LRB); *Famous Players Inc.*, 1997 CanLII 15525 (ON LRB); *Viceroy Construction Company*, 1977 CanLII 516 (ON LRB); *Kraft Canada Inc.*, 1997 CanLII 15518 (ON LRB); *JAK Electrical Contractors Ltd.*, [1997] O.L.R.D. No. 4414 (ON LRB); *Boehmer Box LP*, 2010 CanLII 11171 (ON LRB); *Superior Boiler Works & Welding Ltd.*, [2010] O.L.R.D. No. 4656; *Povoa Carpentry Trim*, [1988] OLRB Rep. November 1174; *PCO Services Inc.*, 1995 Can LII 10062 (ON LRB); *Aerostar Electrical Services Inc.*, 2009 CanLII 9205 (ON LRB); *Canac Kitchens Limited*, 1994 CanLII 9871 (ON LRB); *Rapid Transformers Ltd.*, [1999] OLRB Rep. July/August 675; *Sunnycrest Nursing Homes Limited*, 1982 CanLII 838 (ON LRB); *K Mart Canada Limited*, 1983 CanLII 900 (ON LRB).

118. CUPE requests that the Board declare the responding parties to be related employers within the meaning of 1(4); that the Board declare that the responding parties violated sections 70, 72(a), 72(c) and 76 of the *Act*; and that the Board remit back to the parties the question of remedial relief flowing from the violations of the Act to make CUPE and members of the bargaining unit whole for all losses arising out of the statutory breaches.

The Positions of the Responding Parties

119. There was considerable overlap in the submissions of the responding parties concerning the application of subsection 1(4). Both responding parties contend that the Applicant has not satisfied its onus of establishing either that the technical requirements of subsection 1(4) have been met or that this is an appropriate case for the exercise of the Board's discretion under section 1(4).

120. The responding parties concede that the first requirement of subsection 1(4) has been met: there is more than one business entity. However, they submit that HHS and Sodexo do not carry on associated or related businesses. For reasons that will become clearer later in this decision, I do not intend to set out here further details of the responding parties' submissions on this point.

The responding parties further submit that there is no evidence of common control or direction within the meaning of subsection 1(4) between HHS and Sodexo. They contend that the evidence fails to establish common control and direction between them for the following reasons, among others:

- There was no common ownership or management;

- There was no interchange of employees;

- There were no common labour relations and personnel policies;
- Sodexo operated its own well-established pre-existing business; and
- Sodexo bore the burden of remunerating its cleaners.

121. Sodexo was responsible for its own costs, including wages and benefits

122. In addition, counsel for HHS submits that the existence of an accepted practice in the industry of contracting out the type of service at issue is a relevant consideration. The contracting out of housekeeping services is a standard practice in the health care sector. HHS is joined by Sodexo in submitting that the Board can infer from the contracting out of peripheral services such as housekeeping that the work involved is not viewed as being so integral or core to the operation of the business that the management of the business must keep direct control over the performance of the work.

123. Alternatively, even if the elements of subsection 1(4) have been satisfied, the Hospital and Sodexo contend that a subsection 1(4) declaration should not be issued in the instant case given the absence of any mischief that the section is designed to prevent. Where there is no evidence before the Board of any erosion of bargaining rights, and compelling evidence that there would be an expansion of bargaining rights, the Board should decline to exercise its discretion to make a related employer declaration.

124. Counsel for the Hospital referred me to the following authorities with respect to its position concerning the subsection 1(4) application: *Walters Lithographing Company Limited, supra*; *John Hayman and Sons*, [1984] O.L.R.B. Rep. June 822; *Capricorn Acoustics & Drywall Ltd.*, [1986] OLRB Rep. March 308; *Sobeys Capital Inc.*, [2001] CanLII 10338 (ON LRB); *Ontario Legal Aid Plan v OPSEU*, 1991 CanLII 6009 (ON LRB);[1991] OLRB Rep. November 1327; *Jen-Ry Utility Contracting Company Limited*, [1984] OLRB Rep. December 1724; *Federated Building Maintenance Company Limited*, [1985] OLRB Rep. November 1585; *STM Specialized Transit Management Corporation*, [1991] OLRB Rep. July 900; *Corporation of the City of Stratford*, [1985] OLRB Rep. June 923; *Complete Car Care Centre*, [1983] OLRB Rep. August 1293; *Metropolitan Life Insurance Company*, 1987 CanLII 3281 (ON LRB); *The Charming Hostess Inc.*, 1982 CanLII 824 (ON LRB); *Caressant Care Nursing Home of Canada Limited*, 1984 CanLII 1135 (ON LRB); *Aramark Canada Ltd.* [2001], OLRB Rep. January/February 1; *Ottawa Community Care Access Centre*, 2008 CanLII 56335 (ON LRB); *Etobicoke Public Library Board*, [1989] OLRB Rep. Sept. 935; *Toronto (City)*, [2000] OLRD No. 1687; *Saan Stores Ltd. and Gendis Inc.*, [2001] OLRD No. 2822.

125. Counsel for Sodexo referred me to the following authorities with respect to its position on the application of subsection 1(4): *Kennedy Lodge Nursing Home* [1980] OLRB Rep. October 1454; *Durham Access to Care* [2000] OLRB Rep. 1109; *Ontario Legal Aid Plan (Law Society of Upper Canada), supra*; *Industrial Mine Installations Ltd. v. USWA* [1972] OLRB Rep. Dec. 1029; *Federated Building Maintenance Company Limited, supra*; *Charming Hostess Inc, supra*; *Brant Erecting and Hoisting, supra.*

126. With respect to the unfair labour practice complaint, the responding parties' submissions diverged somewhat. The Hospital took no responsibility for the Porteous letter to Sodexo employees warning them of the risks of CUPE's wage promises, or Ms. Berry's conduct in replacing the defaced LIUNA communiqués. Indeed there was no evidence linking those incidents to the Hospital.

127. Similarly, HHS argued that its agreement to absorb the cost of Sodexo's wage increase was merely a bona fide business decision that was made well after CUPE was certified as the bargaining agent for the JCC cleaners.

128. HHS states that it is neither the employer of the JCC Sodexo employees nor a related employer to Sodexo. As such, section 70 does not apply to HHS in the circumstances.

129. HHS further submits that there is no evidence that it acted on behalf of Sodexo nor is there evidence from which the Board can draw an inference that HHS acted on behalf of Sodexo. To the contrary, the evidence establishes that the sole concern of HHS was the cost to the Hospital of the cleaning services at the JCC, regardless of the contractor or the union which represented the employees of the contractor.

130. HHS has a well-established relationship with CUPE at the Hospital and submits that the evidence does not establish any anti-CUPE bias. Rather, the evidence clearly establishes that HHS' concern stemmed from the cost increases related to the Sodexo contract.

131. HHS further submits that the evidence does not establish that HHS either terminated the Sodexo contract for anti-union reasons or sought in any way to compel any person to become or refrain from becoming a member of CUPE or to refrain from exercising any rights under the Act. To the contrary, the evidence establishes that the Hospital's actions were limited to approving a $2.00 wage increase so as to avoid triggering the RFP process in light of the disruption involved in a change of contractor and its subsequent concern that the Sodexo contract became unaffordable.

132. HHS submits that it is well established that it is not a violation of section 70, 72 or 76 to terminate a contract which has become unaffordable.

133. HHS submits that CUPE retained its bargaining rights for Sodexo. The loss of work for CUPE-represented cleaners working at the JCC was simply the inevitable result of the loss by Sodexo of the contract with HHS. The Hospital submits it was entitled to terminate the contract when it failed to continue to offer cost savings for HHS.

134. In the circumstances, HHS submits that the evidence does not establish a violation by HHS of section 70, 72 or 76 of the Act and requests that the unfair labour practice complaint against it be dismissed.

135. The Hospital referred me to the following authorities in support of its submissions concerning the unfair labour practice complaint: *Comcare (Canada) Ltd.*, [2001] OLRD No. 3042; *Ready Bake Foods Inc., A Division of George Weston Ltd.* [2008] OLRD No. 251; *T. Eaton Company Limited*, [1985] OLRB Rep. June 941.

136. Regarding the Porteous letter, Sodexo asserts that it does not threaten job loss but only that the commercial contract may be put into jeopardy. Moreover, Sodexo did not assert that unionization itself would be a threat to the viability of the enterprise. Sodexo points out it only sent one communication to employees and it did not send it a second time before the second vote. It did not hold any captive audience meetings or send any other communications to employees challenging CUPE. In any event, CUPE was successful in the certification application at the JCC. There is no direct evidence with respect to the impact that the letter may have had on employees at other locations. Finally, section 70 confers

upon employers the freedom to express views about unions and the effects of unionization upon the workplace so long as those views are not coercive, intimidating, threatening, promissory or unduly influential.

137. Sodexo makes the following submissions regarding the defaced LIUNA notice. Ms. Berry testified that it was her practice to put the notation on documentation that was posted on the bulletin board if there were issues with it being defaced or removed. There was no evidence that any employees saw Ms. Berry's notation on the notice or, if they did, that they concluded that it meant Sodexo supported LIUNA's message. Further, there was no evidence with respect to how long the notice had even been posted. Compared to other cases in which the Board has found communication to be unlawful, Ms. Berry's notation on one notice (that is not clear was even seen by any employees), would not communicate to employees that Sodexo supported LIUNA's position. Mr. Murphy, in his evidence, did not express any great concern about the notice and said that he expected LIUNA to engage in such propaganda. In any event, CUPE was successful in the certification application at the JCC, and there was no direct evidence with respect to the impact that Ms. Berry's notation may have had on employees at other locations.

138. Turning next to the $2.00 wage increase, there was evidence that Sodexo had been considering granting the wage increase early in 2008, before CUPE had even applied for certification. Sodexo's concerns were prompted by statutory increases in the minimum wage, the need to address internal wage consistency and maintaining a positive relationship with LIUNA.

139. Sodexo negotiated the wage increase with LIUNA without discussing the issue with the Hospital. At the time that Sodexo granted the wage increase, it had not raised the issue with the Hospital nor had it requested that the Hospital pay for the increase costs.

140. Contrary to the assertion of the Applicant, Sodexo's granting of the wage increase did not have the effect of influencing employees at JCC to vote for LIUNA over CUPE. CUPE was successful in the certification application at JCC. There is no direct evidence with respect to the impact that the increase may have had on employees at other locations.

141. Finally, Sodexo points out there was no evidence that Sodexo would have been forced to cancel the contract with the HHS had the Hospital declined to cover the cost of the wage increase.

142. With respect to the layoff of the JCC cleaners, Sodexo's position is as follows. The Hospital made the decision to terminate Sodexo's contract on its own and for its own reasons. Sodexo simply laid off the employees at the JCC after the Hospital made its decision. As a result of the Hospital's action, Sodexo no longer had work for the employees at the JCC.

143. Sodexo further submits that CUPE had no intention of negotiating a collective agreement with Sodexo. Rather, it notified Sodexo at the first meeting that it had applied for conciliation and it clearly intended to proceed to interest arbitration. At no time after that first meeting did CUPE amend its proposals or suggest that it would be prepared to accept something less than hospital parity. Accordingly, while the contract had not been concluded, it was clear that the ultimate result would be a significant cost increase to Sodexo. It only makes business sense that Sodexo would give the Hospital notice if Sodexo anticipated that it was going to have significant cost increases in its contract.

144. Given that Sodexo had no input into the triggering reason for the lay offs, there can be no suggestion that anti-union animus played any role in Sodexo's decision to lay off employees. The

evidence of the Hospital was that it was acting on its own behalf and in its own interests when it made the decision to cancel Sodexo's contract. Even if in some way Sodexo could be held liable for the actions of the Hospital, it was not an unfair labour practice to terminate the contract in this case. It was a decision made for legitimate economic reasons, and was not done because of any anti-union animus, but rather to avoid an inevitable increase in the cost of the contract. It is not an unfair labour practice to cancel a contract because of increased costs resulting from first contract arbitration.

145. Counsel for Sodexo referred me to the following cases in support of his client's position: *Greb Industries Ltd.* [1979] OLRB Rep. February 1989; *International Wallcoverings* [1983] OLRB Rep. August 1316; *Comcare (Canada) Limited, supra*; *Sherwood Trim & Doors Inc.* 2001 CanLII 13932 (ON LRB); *Bruce Power L.P.* 2011 CanLII 24547 (ON LRB).

Analysis and Conclusions

Are Sodexo and HHS one employer?

146. Subsection 1(4) of the Act reads:

> **1.** ...(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

147. The Board acquires the discretion under section 1(4) to make a related employer declaration when the following three pre-conditions are present:

(i) There is more than one entity involved;

(ii) Related or associated activities or businesses are carried on by the employers concerned; and

(iii) The activities or businesses are under common control or direction.

148. A related employer declaration is a discretionary remedy. Even if the three preconditions are met, the Board can elect to not issue a declaration under section 1(4). The Board has held that it will not exercise its discretion to issue a related employer declaration when the remedy would not serve the purposes of section 1(4).

149. In order to consider exercising its discretion to grant a section 1(4) declaration, the Board must be satisfied that the three pre-conditions have been met.

150. The onus is on the applicant to establish both that the evidence demonstrates that the preconditions of subsection 1(4) have been met and that the circumstances warrant the exercise of the Board's discretion to issue a related employer declaration: see, for example, *Capricorn Acoustics & Drywall Ltd.*, *supra*, at paragraphs 12 and 13.

151. The first element of subsection 1(4) is not in dispute. The responding parties acknowledge they comprise two corporations. However, they dispute (or at least Sodexo disputes) that they together carry on associated or related activities or businesses, and they dispute that they are under common control or direction.

152. For reasons that will become apparent, and although, in my opinion, Sodexo and the Hospital do not carry on associated or related activities – the one being in the business of providing acute health care services, the other in the business of providing food services in institutions – it is not necessary for me to decide this issue. I find that CUPE's subsection 1(4) application fails to establish that Sodexo and the Hospital operated under common control or direction, for the reasons set out below.

153. Over the years, the Board has adopted a number of tests for determining when two or more entities are under common control or direction. None of them are definitive. One of the earliest and oft-quoted cases articulating such a test was *Walters Lithographing Company Limited*, a 1971 decision of the Board. It was not, like this proceeding, a subcontractor case. It involved an application for certification in which the trade union alleged that six corporations engaged in various aspects of the lithography business were one employer for purposes of the Act. The Board set out five criteria in determining whether common control or direction exist, being (i) common ownership or financial control; (ii) common management; (iii) interrelationship of operations; (iv) representation to the public as a single integrated enterprise; and (v) centralized control of labour relations.

154. An analysis of "common direction or control" and the various indicia commonly applied to that concept has been undertaken by the Board in a number of cases specifically dealing with subcontracting and the nature of the subcontracting relationship. For example, in the frequently cited case, *Federated Building Maintenance Company Limited*, *supra*, the Board considered a related employer application in the context of a real estate development and management company, O & Y, contracting with a cleaning company, Federated, for the provision of cleaning services for one of O & Y's 20 large office buildings (First Canadian Place in Toronto), many of which were serviced by competitors of Federated. O & Y had never used its own workforce to clean its properties.

155. The subcontractor relationship between Federated and O & Y was a fairly lengthy one, marked by several contract renewals and the eventual unionization of Federated's employees working at First Canadian Place. The contract renewals all featured price increases predicated upon wage increases that Federated provided to its employees. However, the costs of benefit improvements negotiated between Federated and its trade union were never factored into the cleaning contract price increases – Federated had to absorb those costs.

156. At the outset of the third round of collective bargaining between Federated and the trade union, the principal of O & Y informed the principal of Federated not to expect any increase in the contract price based upon increased labour costs. Federated's principal in turn explained to the union's negotiating team that, if he agreed to the union's wage demands, Federated risked being replaced by a competitor at First Canadian Place. Subsequently, a strike over wages ensued. However, Federated and the trade union eventually reached a settlement.

157. The Board considered the relationship between both companies and noted at paragraph 32 that at least some degree of control and interdependence are inevitable in such dealings:

> Where "A" enters into a relationship with "B," whereby "B" comes into "A's" premises to perform functions to "A's" detailed specifications which were or might be undertaken by "A's" own employees, there will inevitably be something of a "symbiotic relationship" between the two business entities. Their activities will be complementary. They will necessarily be "related" in a general sense and efficiency will usually require that there be some degree of coordination. Moreover, the more closely the purchaser of employee services controls when, where, how, by whom, and at what price the employee services are provided, the more the activities will appear to be under joint control or direction. If at the same time, the subcontractor is effectively dominated by the purchaser or it appears that the notion of a subcontract was introduced to provide a separate non-union corporate vehicle which permits the purchaser to have the same work performed in much the same way as before, but beyond the ambit of its collective agreement, the Board may well find that a section 1(4) declaration is warranted.

158. In determining the degree of control exercised by each respective company, the Board considered a host of key factors that indicated the extent to which the companies were interrelated.

159. The Board noted that Federated was an independent business with its own established employee complement, operating for the benefit of its own principal, while providing its specialized services to a variety of purchasers, of which O & Y was only one. Moreover, the Board observed that there were no common principals, shareholders or financial supporters between the companies, nor was there any common management scheme. There were no common logos, solicitors, accountants, offices or personnel between the companies, and the contract between the companies was the result of a competitive bid by Federation.

160. The Board acknowledged that O.Y possessed some control over Federated and its employees because it reserved the right to terminate the contract if Federated did not remain competitive in terms of cost or quality. However, the Board held that this was not the type of control contemplated by subsection 1(4), explaining at paragraph 36 that:

> Because there is considerable competition for the services which Federation supplies, O&Y may have considerable leverage, but this is no more than a customer would have normally in a favourable market and is not the kind of control which, in itself, would warrant a "related employer" declaration under s. 1(4) of the Act… A degree of functional interdependence is inevitable, and implicit in many subcontracting arrangements. What is significant here is the absence of any other indicia of relatedness, or the mischief which section 1(4) was designed to prevent.

161. The Board concluded that there was no erosion of bargaining rights in the sense of employees or work being transferred to another employer. The work would have gone to another bidder had it not gone to Federated. All factors of control pointed to a legitimate arm's-length relationship between the companies, despite any interrelationship. Thus, the Board refused to issue a related employer declaration.

162. In the *Metropolitan Life Insurance Company* decision, the Board considered an application under subsection 1(4) after Metropolitan Life contracted out cleaning services at a location in Ottawa to Allen Maintenance, an office cleaning business established in 1967. The contracting out caused the termination of a number of employees of Metropolitan Life, including several in the bargaining unit represented by the trade union. The trade union argued that common control or direction was established by the terms of the cleaning contract, which spelled out Metropolitan's cleaning requirements and detailed the various cleaning functions to be performed and their frequency.

163. In rejecting the trade union's argument, the Board observed that Allen Maintenance used its own equipment and supplies to perform the work, and hired its own employees and management and determined their work schedules and job assignments. Moreover, Allen Maintenance independently assessed the performance of its employees, and imposed discipline, including termination. The Board further stated at paragraphs 22 and 23:

> 22. ...The Board does not see the detailed cleaning contract as indicative of control or direction as would satisfy section 1(4). These specifications ultimately go to describing the end product expected by Metropolitan for the price paid. It is not an exercise of ongoing control and direction....
>
> 23. Similarly, clause 7(b) of the contract is not evidence of control or direction by Metropolitan of Allen employees. The evidence is clear that the right to hire, supervise and fire these employees is exercised by management of Allen. Clause 7(b) is a recognition that Allen will provide employees who can provide a service that meets the standards set out in the contract and that Allen will not employ employees who are disorderly. This is not surprising because it must be remembered that the work is performed on Metropolitan's premises. This provision is meant to deal with extreme circumstances and there is no evidence that Metropolitan has exercised it since the contract became effective in 1986. ...

164. Similar observations and results obtained in other Board decisions dealing with subcontracted services such as:

- *The Charming Hostess Inc.* where the contractor (a brewery) and the subcontractors (a supplier of hosts and hostesses and a supplier of food services to the brewery's hospitality room) were described as being in "a symbiotic relationship" characterized by a necessary degree of coordination;

- *The Corporation of the City of Stratford*, a case involving the contracting out of garbage collection in which the Board recognized that mere dependence of the garbage subcontractor on the municipality was not sufficient to establish that the municipality exercised real economic control over the subcontractor;
- *Complete Car Care Centre*, a case involving the contracting out by a car dealership of its automobile washing and rust-proofing work, which the Board found to be an accepted practice in the automotive dealership field, and thus not an integral or core operation of the dealership falling necessarily under its control; and

- *Caressant Care Nursing Home of Canada*, in which a nursing home business had committed to contracting out the entirety of its dietary and housekeeping services at one of its new locations and went ahead with the arrangement even though unionized (and higher paid) employees from another of its nursing homes subsequently were available to perform the work.

165. However, the Board has recognized in the above-cited decisions and others that subcontracting relationships can under certain circumstances bring two or more nominally independent businesses within the parameters of subsection 1(4). As the Board noted in *Diamond Taxi Cab Association (Toronto)*,

> …common direction or control over the activities or businesses are not limited to common ownership or principals. As the Board observed in *Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214, construing this criterion as requiring a nexus through ownership would preclude the fulfilment of the statutory objectives of section 1(4). Moreover, the language of section 1(4) makes it clear that common control or direction can be exercised over related or associated activities, and not just businesses…

166. More recently, in the *Metro Waste Paper Recovery Inc.* decision, the Board discussed the considerations which bear on an assessment of whether a subcontracting is "legitimate" from a labour relations perspective. In that case, Metro won a contract from the Regional Municipality of Durham to operate a recyclable sorting plant. Metro contracted with KAS for the supply of labour to operate the plant. The contract between Metro and KAS conferred the recruitment, training, discipline, termination and all administrative functions in respect of the workforce to KAS. KAS was also responsible to supervise the workers. The plant manager role was left to an individual employed by Metro. In practice and notwithstanding the contract, the Metro plant manager became involved with KAS in decisions about wages, hiring, discipline, health and safety, direction of employees.

167. In arriving at its conclusion that the plant was under common control and direction by KAS and Metro, the Board observed that where otherwise independent entities are functionally and economically integrated at a single location, and their community of interest converges, it may be appropriate to treat the entities as one employer. The Board cited the following considerations concerning the legitimacy of the subcontract:

- the extent to which the contracting business is in a genuine arm's length relationship with the contractor;
- the extent to which the contractor devolves control over the subcontract;
- the more the contractor retains control, the less like a true subcontracting it appears;
- whether the subcontracted work represents a core business of the contractor or is just a periphery matter; and
- in labour subcontracting, the extent to which it is a permanent or a temporary subcontract.

168. I begin by reviewing the criteria set out in *Walters Lithographing Company Limited*, then I will consider the above criteria from *Metro Waste Paper Recovery Inc* to assess the relationship between Sodexo and the Hospital.

169. There is no common ownership between Sodexo and HHS. There is no direct financial control by HHS of Sodexo. Sodexo is a large enterprise that is answerable to its own shareholders, not to HHS. In the limited operation it had in HHS, there was some ultimate control over the viability of that operation by HHS in that there was a point at which HHS would have been unwilling to raise the contract price. That does not demonstrate financial control; it is rather the action of a customer who can no longer carry the price increases of its supplier. There was no common management between HHS and Sodexo. They operated under separate management. Although there was some necessary cooperation between the two entities, their operations were not interrelated. The Hospital provided the services of emergency and urgent health care, Sodexo that of a facilities cleaner. Sodexo's functions had to be coordinated with those of the Hospital's, but that coordination does not suggest control of its operation by HHS. Sodexo ran its own business in the matter it is experienced in doing. HHS and Sodexo are plainly representation to the public as distinct enterprises. Although Sodexo would have had to consult the Hospital to determine what increases to its service contract it could expect as a result of its collective agreement with a union, HHS did not exercise control over Sodexo's labour relations. That remained throughout within Sodexo's exclusive control.

170. So, on all the indices in *Walters Lithographing Company Limited* HHS and Sodexo are separate entities, not under common control and direction.

171. I turn now to the criteria in *Metro Waste Paper Recovery Inc*. First is the extent to which the contracting business is at a genuine arm's length from the contractor.

172. I do not accept CUPE's submission that the Hospital and Sodexo shared control over Sodexo cleaners and frontline managers. Apart from one isolated example, where Ms. Carson pondered the possibility of combining two Sodexo management positions and eliminating three Sodexo project cleaners as a means of saving costs and better absorbing the Sodexo $2.00 wage increase, there was no evidence that HHS influenced Sodexo's staffing levels. Furthermore, while it is true that the Management Agreement called for Sodexo's employees to clean to the Hospital's standards (the kind of contractual provision one might expect to find in any labour subcontract), clearly Sodexo had a pre-existing expertise in the cleaning of hospitals generally, and apparently required little in the way of direction from or familiarization by HHS in terms of its expectations/standards in order to go about performing the cleaning function at the JCC. There was no evidence that the Hospital ever inspected Sodexo's work, and all kinds of evidence that Sodexo was habitually self-regulating in terms of assessing the quality of the non-clinical cleaning at the JCC. Finally, the Hospital had next to nothing to do with the day-to-day scheduling, training, discipline, or evaluation of any of Sodexo's employees, front-line or managerial, all of whom carried out their responsibilities under Sodexo's policies, procedures, guidelines and collective agreements as the case may be. At best, the Hospital had a limited involvement in the recruitment (or, more accurately, the vetting) of Sodexo management at the JCC. Again, that is hardly surprising in a relationship of this kind, or particularly indicative of control or direction, shared or otherwise, over Sodexo employees. In short, when it comes to an assessment of the degree of the Hospital's control over or direction of Sodexo employees in the performance of their work, the relationship between Sodexo and the Hospital, in my view, based upon the preponderance of the evidence, was almost rigidly arm's length.

173. The same, however, perhaps cannot be said as unequivocally about the Hospital's influence on the wages of Sodexo employees. Initially, of course, wage levels were determined by Sodexo and LIUNA, entirely independent of the Hospital (although, no doubt, with an eye by Sodexo to its remuneration from HHS under the Management Agreement). Sodexo then negotiated, implemented and absorbed the $2.00 wage increase without the Hospital's input. That was an arm's length decision taken by Sodexo, as was the Hospital's initial decision to say no to Sodexo's subsequent request for relief, notwithstanding Sodexo's argument that it would be in the Hospital's best interests to go along with it. What then followed was Sodexo's ultimately successful attempt to obtain the Hospital's agreement to absorb the wage increase after CUPE was certified at the JCC. The Hospital's decision to absorb the increase was based upon a number of factors, including the possibility that Sodexo might walk away from the JCC contract and place the Hospital in the position of having to find another service provider, with the health risks that entailed, as well as the fact that there were other off-setting savings offered by Sodexo to cushion the impact of the additional wages.

174. The fact that Sodexo looked to the Hospital to alleviate the impact of the wage increase is hardly surprising - Sodexo is a profit-seeking business. The Hospital entered into a dialogue with Sodexo to see how HHS might assist Sodexo to cover its higher labour costs at least in part because the Hospital wanted to avoid a change in the subcontractor and could achieve countervailing savings from Sodexo in any event. This does not constitute persuasive evidence that, as CUPE contended, the Hospital effectively controlled the wages of Sodexo employees to a degree uncharacteristic of a legitimate subcontracting arrangement.

175. CUPE contends that Sodexo had virtually no chance of profit or risk of loss under the Management Agreement. Counsel for CUPE and counsel for Sodexo engaged in a lively debate in their submissions whether the Management Agreement was, as CUPE contended, a "price plus" agreement or, as submitted by Sodexo, a "profit and loss" agreement. I do not think I need determine which characterization is the correct one. Counsel for CUPE is correct that the so-called "profit" was really a management fee that Mr. Porteous tacked on after determining Sodexo's costs, and that there was little opportunity for Sodexo to increase substantially that management fee. And, as CUPE points out, when there was such an opportunity - by taking advantage of labour savings occasioned by vacant management positions - Sodexo instead passed those savings on to HHS. Furthermore, Sodexo was protected to a degree under the Management Agreement from exposure to certain increased costs, such as increases in the minimum wage. These the Hospital was obligated to bear. On the other hand, Sodexo was not immunized from every cost increase. It was important that Sodexo control its budget for labour, manage its WSIB costs, and so forth. It could not insist, as a matter of contractual right, that the Hospital cover overruns in those areas. Also, there was an opportunity for Sodexo to realize a greater return by finding savings in the cost of supplies. So, while I agree with the general thrust of CUPE's argument concerning Sodexo's chance of profit and risk of loss, it does not significantly advance CUPE's position concerning the legitimacy of the subcontract. It does not lead me to conclude that Sodexo was simply managing the business of its client, as was the case in the *Thunder Bay Hospital* decision.

176. CUPE contends that ownership of the tools used to carry out the non-clinical cleaning by Sodexo is a factor in this case that undermines the legitimacy of the subcontract. In this regard, it points to the cleaning equipment supplies for which, though purchased and legally owned by Sodexo, the Hospital was billed over the course of time. CUPE also draws the Board's attention to Sodexo's use of the Hospital's computers. Sodexo countered most of CUPE's points on this issue. For example, Sodexo billed the Hospital its depreciation costs in respect of the cleaning equipment, and maintained legal ownership for the purpose of maintaining and repairing the equipment as it saw fit. And Sodexo owned other significant assets used in the course of providing its services to HHS, both administrative (payroll

software, payroll computer) and operational (card swipe system, uniforms, Gold Check software Morse key system, training materials, chemical dispensing system) the costs of which were entirely borne by it. I do not find that the ownership- of-the-tools factor favours any party particularly concerning the legitimacy of the subcontract.

177. Finally, CUPE submits that the fact that the Hospital's logo appeared on the JCC cleaners' security badges (as did Sodexo's name, under the name of the individual) undoubtedly created the impression in the public's mind of a level of integration between the responding parties. Quite simply, I am not at all persuaded of that, and in any event, I place no weight on this with respect to whether there was a true, arm's length subcontracting relationship between HHS and Sodexo.

178. I turn to a consideration of the extent to which the Hospital devolved control over the subcontract. Counsel for CUPE submitted that the Hospital and Sodexo *shared* control over Sodexo's cleaners at the JCC, with Sodexo controlling most of the front-line managerial functions of its operation and the Hospital retaining ultimate control over matters as fundamental as employee remuneration, employee staffing levels and – critically - Sodexo's collective bargaining with CUPE. In CUPE's submission, shared control, not exclusive control, is all that is required to prove *common* direction or control under subsection 1(4). Moreover, this particular manner of dividing up control was exhibited in *Brantwood Manor,* where the Board analogized that client/subcontractor relationship to that of a senior manager and first-line manager within a single enterprise. The same analogy and conclusion applies here, CUPE contends.

179. In my view, CUPE's argument on this point is overstated. As I have observed, Sodexo exercised significant daily control over of all of the front-line managerial functions at the JCC, including hiring/firing/discipline, orientation training, scheduling, day-to-day direction regarding the performance of cleaning work, and performance evaluation. On the other hand, the Management Agreement conferred upon the Hospital certain "oversight" rights in these areas (for example, to review Sodexo's duty lists, to participate in interviewing management personnel, to provide input regarding employee performance reviews conducted by Sodexo, to insist that Sodexo's policies and procedures conform to those of HHS, and to request the removal of a Sodexo employee). Contractually, the Hospital retained some considerable authority in regard to Sodexo's cleaners and managers. But even taking that into account, as a practical matter the Hospital ceded control of non-clinical cleaning to Sodexo. This factor favours the responding parties' position that they did not share common control or direction.

180. Was the subcontract between the Hospital and Sodexo more in the nature of a permanent or a temporary arrangement? The relationship between the responding parties for the provision of non-clinical cleaning services commenced in 2002 and has endured despite the termination of the JCC arrangement. The Management Agreement that applied to the JCC would have, but for the termination by the Hospital, continued for several more years. Viewed in that context, the relationship is more permanent than temporary. In addition, Sodexo supplied HHS with a relatively permanent workforce who worked exclusively at the Hospital and were not dispatched to work for Sodexo's other clients. Sodexo could not be easily replaced at the JCC (or other sites) without some safety risk. The degree of functional and economic integration between two entities is a factor that distinguishes a legitimate subcontracting arrangement from one that attracts the application of subsection 1(4). In this regard, the permanency of a labour subcontract is an indicator of functional and economic integration. I find that, with respect to the associated activity of cleaning the Hospital, Sodexo and HHS were functionally and economically integrated to a considerable extent. This factor favours CUPE's position on the question of common control or direction.

181. Next, I consider whether the work performed by Sodexo constituted a core or a peripheral function of the Hospital. I think there can be little debate that the cleaning of any area of a hospital – clinical or not – has a considerable bearing on a hospital's essential mandate of providing patient care. As Ms. Carson identified in her memorandum, if this work was not done properly, then HHS was susceptible to an increased risk of disease outbreaks which presumably would not confine themselves to the non-clinical areas of the Hospital. To this end, Hospital and Sodexo employees alike are trained in the Hospital's cleaning standards and infection control procedures. However, as counsel for the Hospital suggested in his oral argument, important though the cleaning function is for patient health, it is not the core function of a hospital, which is professional medical attention for patient care. In contrast, all Sodexo does is provide a cleaning service. For HHS it must perform at a high standard, but that function is different from HHS's core function.

182. In summary, I have found the following with respect to the subsection 1(4) requirement of common control or direction:

i. the relationship between HHS and Sodexo constituted a genuine arms-length subcontract;

ii. the Hospital largely devolved control over the subcontract to Sodexo, but retained some controls;

iii. the Hospital's cleaning function is not a central function, but more in the nature of an adjunct to its core hospital function; and

iv. the subcontract between HHS and Sodexo was more in the nature of a permanent than a temporary subcontract.

Only factor (iv) favours CUPE's position. The key weight must be attributed to control. Weighing the factors together I have no doubt that Sodexo exercised independent control over its operation, separate from the Hospital, with its own profit imperative. The cooperation and coordination necessary between Sodexo and HHS is not sufficient to conclude that they are under common control and direction. From this I conclude that the subcontract between HHS and Sodexo was legitimate from a labour relations perspective.

183. For these reasons, I find that the responding parties are not under common control or direction. Accordingly, there is no need to consider the issue of the Board's discretion to make a declaration under subsection 1(4).

184. The subsection 1(4) application is dismissed.

The Unfair Labour Practice Complaint

185. The Applicant alleges that the responding parties violated sections 70, 72(a), 72(c) and 76 of the *Act*. These provisions read:

> **Employers, etc., not to interfere with unions**
>
> **70.** No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to

> deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence. 1995, c. 1, Sched. A, s. 70.
>
> **Employers not to interfere with employees' rights**
>
> **72.** No employer, employers' organization or person acting on behalf of an employer or an employers' organization,
>
> (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
>
> ...
>
> (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act. 1995, c. 1, Sched. A, s. 72.
>
> **Intimidation and coercion**
>
> **76.** No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act. 1995, c. 1, Sched. A, s. 76.

186. Section 70 of the *Act* prohibits the employer from interfering with the process of unionization and with the union's representation of employees. Section 70 thus protects employees from actions of the employer that may interfere with their free choice or ability to be represented by a union. Section 72 prevents an employer from penalizing or treating differently an employee because he or she is a union member or is exercising rights under the Act. Section 76 prohibits a person from using intimidation or coercion to stop another person from exercising rights under the *Act*. These provisions are all designed to ensure that "certification is meaningful, both from the union's perspective and from that of the employees who expressed the desire to act collectively."[5]

187. The Board has suggested in at least two decisions that no anti-union *animus* need be established for a finding of a violation of section 70, provided that the impugned conduct constitutes more than "incidental" interference with the union. Anti-union *animus* is a necessary ingredient under section 70 where the impugned conduct interferes with the union only "incidentally". Conduct that threatens the formation or the very existence of the union will infringe section 70 without the need for any specific finding of anti-union *animus*.[6]

---

[5] *Plaza Fiberglas, supra* ¶17.

[6] *Hydro One Inc, supra,* ¶73-76; *Belleville (City, supra,* ¶ 33-35.

188. In order for the Board to find anti-union *animus* under sections 72, 76 (or under section 70 where the interference is "incidental"), it is not necessary that the impugned decision was motivated *only* by anti-union considerations. Conduct which is tainted by anti-union *animus* will constitute an unfair labour practice under the *Act.*[7]

189. Subsection 96(5) of the *Act,* the "reverse onus" provision, imposes upon the responding parties the burden of proof to show that they did not act contrary to the Act.

190. The complaint in this case alleges that members of the JCC bargaining unit have been threatened, coerced and ultimately terminated from their employment because they exercised their rights under the *Act.* The reverse onus therefore applies. The legal burden is on the responding parties to prove, on a balance of probabilities, that they did not violate the *Act* as set out herein.

191. With these principles in mind I turn to the facts in this case, and in particular, those events that CUPE says ought to persuade the Board that both responding parties, individually and together, violated the Act. CUPE contends that Sodexo is implicated in all of the major events, that HHS is implicated in some of them, and that they are equally responsible for the triggering incident, the allegedly unlawful layoff of the JCC cleaners.

192. CUPE contends, and the responding parties deny, that the Porteous letter of July 9, 2009 to Sodexo employees at the Hamilton, Henderson and JCC sites, on the eve of the first runoff vote between CUPE and LIUNA, violated section 70 and subsection 72(c) of the Act. HHS's submission is that there was no evidence to implicate the Hospital with respect to the letter. I agree.

193. Sodexo's characterization of the letter is that it was merely expressing the business reality associated with subcontracting relationships such as this one.

194. My view of the letter is this. Clearly, Sodexo was concerned that, should CUPE become the bargaining agent, it would seek a wage level for the JCC that could, if implemented, render Sodexo uncompetitive and put the commercial contract applicable to the JCC site in jeopardy, resulting in the possible unemployment of the Sodexo employees. Sodexo wanted to avoid the risk of that loss. The way to do so was to convince the JCC employees to reject CUPE and stay with LIUNA. Not surprisingly, Mr. Porteous did not come right out with such a brazen admonition against the selection of CUPE. Nor did he predict certain job loss if CUPE becomes the bargaining agent. But his letter does raise the possibility of such a result, if only speculatively. That is the unmistakeable message behind Mr. Porteous' communication. What conclusion could the employees have reached after reading the letter, other than that their employer wanted them, for the sake of the commercial contract to which they owed their job security, to reject CUPE's overtures and stay with LIUNA?

195. Both CUPE and Sodexo relied upon the decision in *JAK Electrical Contractors.* That case involved an application for certification in the construction industry. There were several conversations between the employer's principals and individual employees in which the employer expressed the view that unionization would result in higher wage rates, thus rendering the employer uncompetitive, with the result that job loss would be likely. That view was also expressed by the employer at an all-employee meeting called by the employer.

---

[7] *Westinghouse Canada Limited, supra,* 577 ¶44 & 56,; *The Globe and Mail, supra* ¶40; *Steinberg Inc. (Miracle Food Mart Division), supra* ¶135-136.; *Greenberg Stores Limited, supra,* ¶19.

196. At the hearing into the matter, the employer argued that it had simply been engaged in a candid articulation of its economic analysis of the reality of unionization. The Board disagreed. The Board found the comments to go beyond legitimate employer free speech. Moreover, regardless of the authenticity or accuracy of the employer's opinion, the Board concluded that, having regard to the fact that the employer had also made several other inappropriate and unlawful comments and promises, the primary motivation behind the economic analysis was to intimidate, threaten and coerce the employees into rejecting unionization. At paragraph 148, the Board observed:

> ... It was entirely appropriate for the employer to comment on issues such as wages, benefits and competitiveness during the course of this organizing campaign, as long as it did not comment in such a way as to promise, threaten, coerce, intimidate or unduly influence its employees. Because of the highly sensitive nature of the concept of competitiveness, and its connection to job security, great care must be taken in how an employer comments on that issue. As noted by the Board in paragraph 36 of *Vogue Brassiere Incorporated,* cited above, "an employer who raises the spectre of a loss of jobs incurs a significant risk of running afoul of the law". In order to ensure that it does not violate the Act, the employer must not make predictions regarding the impact of unionization in the abstract or that are speculative in nature. Any such prediction must be, as noted in the *Gissel Packing Co.* case, carefully phrased, be made on the basis of objective fact, and reflect the employer's belief regarding the demonstrably probable consequences of unionization. In my view, this is where the employer erred in its communications with its employees.

197. I think it is clear from the language of the Porteous letter that it conveys a subjective belief that if CUPE succeeded in its raid of LIUNA it might achieve wage gains to the point HHS would be unwilling to maintain its contractual arrangements with Sodexo. Mr. Porteous did not say, "You risk losing your employment with Sodexo if you select CUPE" He did, however, allude to the fact that, if the commercial contract failed to provide competitive services, Sodexo's competitors would be more than happy to step in its place, with no obligation to "rehire" the JCC employees or recognize their trade union. In other words, their employment with Sodexo could end and there were no guarantees they would find gainful employment with the successor.

198. This type of employer communication is troubling. It is implicit in the Porteous letter that Sodexo was taking sides in the CUPE raid. From it, plainly Sodexo preferred to deal with LIUNA rather than CUPE. Mr. Porteous achieved this result by pointing out that CUPE's wage promises could result ultimately in a decision by HHS to terminate the subcontract by the Hospital. There was no need to proclaim that the current wage levels under the LIUNA collective agreement suited Sodexo just fine. The employees would have understood that. However, on its own, this letter would at best warrant only a declaration by the Board of a violation of the Act, given that the employees at the JCC voted for CUPE anyway in the end.

199. I move on to the defaced LIUNA posting which Ms. Berry took pains to correct and re-post. I agree with CUPE's submission that Ms. Berry must have at least read the posting in order to understand that it had been defaced. Consequently, her testimony that she did not read the contents of the posting defies credulity, and serves to undercut her explanations as to why she on several occasions re-posted the

notice and issued a warning to employees not to remove or vandalize the document. I think she did so, at least in part, because she appreciated that a LIUNA victory at the JCC was in Sodexo's best interests. Again, this is interfering employer behaviour. It could easily be interpreted by employees as a sign the employer is "taking sides" on a decision that was entirely theirs to make. But viewed in isolation, or even in combination with the Porteous letter, it warrants only a declaration of a violation of the Act. That is because the actions of Ms. Berry did not influence the JCC employees sufficiently to cause them to reject CUPE.

200. Next, I consider the issue of the $2.00 per hour wage increase provided by Sodexo to the JCC employees (and the other unionized employees of Sodexo employed at HHS). Sodexo suggests that the increase was based upon a number of benign factors, including anticipation of changes in the statutory minimum wage. However that may be, it is beyond doubt that one of the key factors in Sodexo's rationale was the CUPE raid of LIUNA at the JCC (and the anticipated CUPE raid of OPSEU at the Chedoke and MUMC sites of the Hospital). I am driven to this conclusion for two reasons. First, there is the question of timing. Within several weeks of the first failed foray by CUPE, marked by the withdrawal of its application for certification on July 10, 2008, and just prior to CUPE's second, widely anticipated, attempt on August 22, 2008, LIUNA announced it had reached a new wage deal with Sodexo. Sodexo was under no legal obligation to bargain or reach an agreement with LIUNA concerning a wage increase in mid-August 2008. Nor was the statutory minimum wage about to rise at that point: the date for compliance with the new law was still more than six months in the future.

201. Secondly, Sodexo's communications with the Hospital suggest that the CUPE raid was foremost in its mind when it decided to bargain a wage increase with LIUNA. Mr. Kimmett's letter of August 25, 2008, written three days after the second CUPE displacement application was filed, bears this out. In it, Mr. Kimmett explains that the $2.00 wage increase was negotiated in order "to maintain positive employee relationships" and in anticipation of pending changes in the minimum wage law. He also justifies the size of the increase by pointing out that it is a mere fraction of what might be expected should there be an arbitrated award granting hospital based wage and benefit plans. That is a most telling comment. It suggests that hospital parity for Sodexo employees is neither in the interests of Sodexo nor the Hospital, and can be avoided by Sodexo reaching a less expensive compromise with LIUNA.

202. This point is made again in a second Sodexo letter to the Hospital about one month later, at a time when CUPE's second application for certification was still playing out. Mr. Porteous's correspondence to Ms. Carson requests support from HHS for a similar wage increase at the Chedoke and MUMC sites represented by OPSEU. Mr. Porteous mimics Mr. Kimmett in suggesting to Ms. Carson that a $2.00 increase represents "less than one-quarter of the increase associated with an arbitrated award granting hospital-style wage and benefit plans." He then writes even more plainly that the wage standardization achieved by the $2.00 boost across all of the HHS sites service by Sodexo is necessary "to avoid a raid by CUPE at the [MUMC] and Chedoke sites". Moreover, the $2.00 wage increase is characterized by Mr. Porteous as "an attempt to strike a balance, which will allow Sodexo to continue to be a competitive service provider for our clients…"

203. It is evident, in my view, from the timing of the wage increase and from the documentary record described in the two preceding paragraphs, that the $2.00 wage increase was, at least in part, if not entirely, motivated by Sodexo's desire to help LIUNA and avoid CUPE whose prior efforts to challenge the Hospital's outsourcing to Sodexo were well known to both responding parties. Sodexo was alarmed by the possibility of a CUPE victory, and the prospect that CUPE would demand hospital parity in respect of the wages and benefits being paid to Sodexo employees at HHS. As is evident from the correspondence by Mr. Kimmett and later by Mr. Porteous, Sodexo knew that, though it could resist such

a demand at the bargaining table, nothing prevented CUPE, which had previously demonstrated a litigious approach toward the subcontracting of Hospital cleaning services, from making a case for hospital wage parity to an interest arbitrator. And an arbitrated award of that magnitude constituted a threat to Sodexo's competitive standing with HHS, and perhaps beyond.

204. Certainly, Sodexo's problem with CUPE was not lost on the Hospital, although initially HHS did not agree to absorb the cost of Sodexo's wage increase. In the course of a meeting between Hospital and Sodexo representatives on October 16, 2008, Sodexo referred to CUPE's strategy to rely upon the *Hospital Labour Disputes Arbitration Act* to achieve hospital wage parity at HHS and in the healthcare sector generally, according to notes of the meeting made by Ms. Carson. Ms. Carson candidly admitted in cross-examination that she came to realize that CUPE would likely request hospital rates of Sodexo, and that this had the potential to defeat the business case for the cleaning subcontract. In the memorandum she co-authored to the HHS corporate management team (entitled, "Memo Regarding Sodexo Partnership Challenges"), Ms. Carson states unequivocally that Sodexo negotiated the wage increase with LIUNA in order to ward off representation by CUPE. She speculates as to CUPE's broader agenda to gain hospital wage parity for all healthcare workers. And she advises the corporate management team of CUPE's pending opportunity to raid OPSEU at the MUMC and Chedoke sites, and the possibility that OPSEU is prepared to fight CUPE, given her knowledge that OPSEU has served Sodexo with notice that it wishes to meet to discuss wage rates. In the end she recommends the preservation of the Hospital's "partnership" with Sodexo through absorption by HHS of the wage increase under certain conditions that have been previously described.

205. Ms. Carson's notes and oral testimony confirm, in my view, that the Hospital was concerned with the viability of the subcontract with Sodexo when it made the decision in mid-January 2009 to absorb the $2.00 wage increase through an increase to the labour rate in the Management Agreement. Throughout the fall and early winter of 2008, Sodexo impressed upon the Hospital the reasons why it was anxious to avoid CUPE. Ms. Carson certainly was getting the message, and she conveyed her understanding of CUPE's broad agenda to obtain hospital wage parity for all hospital-based workers to the Hospital leadership. It is true that, by the time the Hospital agreed to the Sodexo wage increase, CUPE was ensconced at JCC as the bargaining agent. But it is also the case that CUPE had tried and failed to displace LIUNA at two other HHS sites, and that the Hospital was aware of the possibility of CUPE raids of OPSEU at still other HHS sites. Ms. Carson specifically warned the Hospital leadership of that possibility. Moreover, in materials of a presentation made to the Hospital at Sodexo's "Clients for Life" meeting on March 25, 2009, Sodexo cited as one of its accomplishments its successful "diversion" of the CUPE displacement applications involving the Hamilton and Henderson sites. In my view, this claim by Sodexo is a transparent admission that it wished to see CUPE defeated, that it actively participated in pursuit of that objective, and that its labour relations victory was not only good for Sodexo, but also its client, the Hospital.

206. It is possible the Hospital would not have agreed to Sodexo's request had there not been off-setting cost savings elsewhere. Certainly Ms. Carson attempted to sell HHS senior leadership on the notion that those savings would help defray the increased labour costs. What is noteworthy, however, is that the Hospital went to considerable lengths in order to justify the absorption of a significantly large wage increase, when it could have, as it did in March 2009, simply refused to entertain even the prospect of higher labour costs.

207. Having said that, it is also conceivable that the Hospital agreed to absorb the wage increase at JCC and other sites because it wanted to avoid the serious problems associated with cancellation by Sodexo of the Management Agreement. Disruption of hospital cleaning services is a serious matter. Ms.

Carson testified that she did not think Sodexo's services could be replaced without some inevitable decline in cleaning standards until the new service provider was fully up to speed. That raised in her mind the risk of disease outbreaks. She had some doubts that Sodexo could even be replaced by a single alternative provider, raising the prospect of even further disruption in the event the Hospital had to enter into arrangements with multiple providers.

208. While I am prepared to find that one of the reasons the Hospital decided not to terminate the Management Agreement was that it did not relish the idea of going through the process of finding a replacement for Sodexo and taking a risk that cleaning standards would decline to the point of an outbreak, the flaw in that logic becomes apparent when viewed through the lens of subsequent events. The same concerns about the consequences of changing cleaning subcontractors applied in March 2009 when HHS decided to terminate the Sodexo arrangement at JCC after learning that CUPE had merely proposed a large wage increase for the JCC employees of Sodexo. The Hospital did not hesitate to begin the process of replacing Sodexo even though there was no real prospect of any immediate wage increase for quite some time, nor was there any obligation on the part of the Hospital to agree to absorb further wage increases should CUPE ultimately have been successful in obtaining them for the JCC employees. In other words, the Hospital chose in January 2009 to absorb an implemented, negotiated wage increase, with retroactivity covering four HHS sites; but just over two months later, the Hospital promptly cancelled the subcontract with Sodexo for services at the JCC in the face of CUPE's opening demand for hospital wage parity at the commencement of bargaining.

209. I conclude, therefore, that Sodexo's decision to implement the $2 wage increase constituted a violation of the Act. Sodexo wanted to avoid CUPE altogether, and hoped that LIUNA would remain as the bargaining agent. That was one of the reasons behind Mr. Porteous' letter to the employees and Ms. Berry's efforts to protect LIUNA's posted communiqué. The $2 wage increase was an inducement to persuade Sodexo's bargaining unit employees to prefer LIUNA over CUPE. However, it did not have the desired effect at the JCC. The employees in the JCC bargaining unit still voted for CUPE. Accordingly, once again, Sodexo's behaviour would not attract more than a declaration of a violation of section 70.

210. The Hospital's decision to help Sodexo manage the wage increase was for bona fide operational reasons. It may well be that the Hospital was also anticipating future CUPE raids, but that, in my view, is too remote a factor to conclude that HHS committed an unfair labour practice when it decided to underwrite the wage increase in respect of the JCC. The Hospital did not want to change cleaning subcontractors in mid-stream, and the $2 wage increase was capable of being offset by other reductions in expenses. I find therefore that the Hospital did not violate the Act in supporting Sodexo's $2 wage increase.

211. I come to the more serious alleged misconduct. The Hospital ultimately cancelled the subcontract solely on the basis of CUPE's tabled wage demand. The problem for the Hospital is two-fold. First, Mr. Kimmett candidly admitted in the course of his testimony that he had informed Ms. Carson of CUPE's proposal. Secondly, Ms. Carson's subsequent draft letter to Mr. Kimmett cancelling the contract clearly acknowledged and thanked Mr. Kimmett for his having informed Ms. Carson of the CUPE wage proposal. I am satisfied therefore that Mr. Kimmett explained to Ms. Carson that CUPE was seeking hospital wage parity, that he estimated this would translate into a minimum $5 per hour wage increase, and that, based on the information provided by Mr. Kimmett, HHS cancelled the Management Agreement.

212. It seems to me that Mr. Kimmett's phone call to Ms. Carson on the day CUPE tabled its bargaining proposals had a certain labour relations purpose behind it, and was more than just a courtesy call. Mr. Kimmett testified that he contacted Ms. Carson because, after all, a Sodexo client ought to be forewarned about a potentially significant wage increase that would have a direct and momentous bearing on the subcontract. Curiously, however, client relations appear not to have been foremost in mind when Sodexo implemented a significant wage increase in three bargaining units a few months previous. There was no evidence of any forewarning to the Hospital then of what amounted to about a 20 per cent wage increase for Sodexo cleaners. In fact, Sodexo and the Hospital insisted that Sodexo made that decision entirely independently and unilaterally, without the Hospital's knowledge or tacit consent. If that was the case, I think Mr. Kimmett's phone call to Ms. Carson warning of an imminent price increase following a single bargaining session with CUPE was more in the nature of an invitation by Sodexo to the Hospital to terminate the Management Agreement with respect to the JCC. And it was an invitation hastily accepted by HHS. It suggests the responding parties were working together in furtherance of their respective interests to effect a labour relations result (i.e., the frustration of collective bargaining) between Sodexo and CUPE.

213. The Hospital offered no compelling *business* reason for the timing of its decision to give notice of the termination of the subcontract covering the JCC on March 27, 2009. As I have indicated, at that stage CUPE had done nothing more than table its opening set of demands calling for large wage increases and other monetary improvements, and filed for the appointment of a conciliation officer. There was no cause for panic by either responding party, both of whom are sophisticated and experienced in matters of labour relations. There were still years remaining on the Management Agreement. The collective bargaining process had barely begun. Neither CUPE nor Sodexo were in any position at that stage to go off to interest arbitration immediately. CUPE may well have been looking forward to the day it could argue for hospital wage parity in front of an arbitrator, but that day was not yet imminent. In any event, CUPE was by no means guaranteed any measure of success in obtaining from an arbitrator a huge wage increase for the JCC bargaining unit. Mr. Kimmett's estimate of a minimum $5 increase seems to have been pulled out of the air. I do not know how he arrived at that figure, or why Ms. Carson accepted it as an incontrovertible fact. They both appear to me to have "jumped the gun" as it were, and by a considerable margin.

214. More importantly, there was no evidence to suggest that there was some urgent business imperative on the part of the Hospital to notify Sodexo immediately of its intent to cancel the Management Agreement in the middle of its operation and begin the search for a new cleaning subcontractor. It is difficult to see how the Hospital would have been prejudiced in any way simply by biding its time to see how CUPE and Sodexo's bargaining resolved itself.

215. The responding parties both rely on the *Comcare* decision in which the Board dismissed an unfair labour practice complaint following the cancellation of a contract which resulted in a very significant loss of work for bargaining unit employees. In that case, the employer (Comcare) cancelled its contract to provide nursing services to a Community Care Access Centre ("the CCAC"), claiming that the financial impact of an arbitration award in favour of Comcare's nurses caused it to lose money under the CCAC contract. The Board noted that the close juxtaposition of the arbitration award with the decision by Comcare to end the contract was enough to suggest the possibility of an improper motive. However, the Board found that Comcare not only had a "clear and cogent operational explanation" (¶41) for cancelling the contract, but that this operational explanation was the sole reason for its conduct. Thus, the Board concluded that Comcare's decision was not tainted by anti-union *animus*.

216. Critical to the Board's determination that Comcare had a "clear and cogent operational explanation" for cancelling the contract was detailed evidence proving that the consequences of the interest arbitration award were severe for the employer. As the Board described:

> 22. ...What resulted, and became clear during the course of the hearing, was the actual financial impact of the arbitration awards. Mr. Christie, Comcare's counsel, took the trouble to prepare a synoptic document which distils the various alterations and corrections which need to be made to the May 1998 analysis and the January 1999 analysis in order to arrive at the actual financial impact of the arbitration awards on the employer. I refer to this document as "The Financial Impact". The document is a considerable help in understanding the effect of the arbitration awards on Comcare's finances.
>
> 23. The Financial Impact reveals that the arbitration awards gave an effective 9.89% increase to the company's wage bill. To that was added a 25% benefit cost increase. The document shows that on annualized revenue of $1,026,955.00 the company would have sustained a loss of approximately $120,000.00, without the cost increases brought about by the arbitration awards in respect of other incremental increases in direct cost to such items as compassionate leave, call-ins, standby and so forth. What the company faced was a considerable drop in revenue (there being significantly less visits than there were in 1998, hence less reimbursement income) and, at the same time, a significant increase in direct costs and some increase in indirect costs.
>
> 24. The financial impact of the arbitration awards was to place Comcare into a loss situation as regards its nursing services operation in Kingston. Far from earning its target of 6% net profit, it was in a loss situation without any prospect of that improving. In fact, on each day it continued in operation after February 11, 1999, its loss was accumulating. It was in that context that the decision was taken on September 10, 1999 to return the CCAC contracts.
>
> 25. What is clear from the above is that the economic consequences of the collective agreement (required by the interest arbitration awards) were severe for the employer. The awards put the company's nursing services operation in Kingston, which prior thereto was barely profitable, into a significant loss situation.

217. Having found that Comcare had a legitimate economic rationale for cancelling the contract, the Board did not stop there, but went on to consider whether this proven economic rationale was Comcare's only reason for cancelling the contract. In this regard, the Board carefully assessed "the details of how the decision was made" (¶41) and concluded that:

> 35 ...The decision to return the CCAC contracts was taken after careful deliberation, which followed a detailed financial review of the consequences of the final arbitration award.
>
> 36. The evidence suggests that only when it was quite clear that the company would not be able to operate without a loss, let alone

> make a profit, was the decision to hand back the CCAC contracts made. The company weathered some difficult times before the certainty of a continuing loss and liability become [sic] a reality. This suggests that the company was not quick or hasty in reaching its decision to end its nursing service for the CCAC in Kingston.

218. Specifically, the Board considered that Comcare had not only waited for the final interest arbitration award to be issued before making its decision, but had also taken the following steps:

- It had "inquired to determine if the CCAC was willing to grant some relief to the company by raising its reimbursement rate for the balance of the term of its contracts. The CCAC was unwilling to do so" (¶31).

- It had prepared and discussed, at a meeting of its Executive Committee, "a detailed analysis of the then current financial circumstances of the operation," including "a spreadsheet which incorporated the financial consequences of the arbitration awards" (¶32).

- At the same meeting of the Executive Committee, "over a period of several hours, different variables were tested to see if there was some way in which the operation could be made financially viable. The effort proved unsuccessful" (¶32).

219. In contrast to the facts in *Comcare*, the responding parties have not proven the "actual financial impact" of an interest arbitration award, and they certainly have not established that they were facing a "severe" financial loss as a consequence of an arbitration award. The responding parties did not adduce evidence of their financial situation against which the impact of a hypothetical interest arbitration could be measured. The only evidence before the Board is that, on the basis of a single telephone call in which Mr. Kimmett and Ms. Carson extrapolated from CUPE's opening wage proposal an imminent $5 per hour increase in the labour rate, the Hospital came to the decision to end its business relationship with Sodexo at the JCC, and commence the not-so-easy task of finding a replacement cleaning service, with the attendant health risks that are inevitable during such a transition. It strains credulity to find that there was a legitimate business reason for Sodexo to have advised HHS of an imminent price increase (when in fact there was no imminent prospect of a sudden rise in labour rates), and that there was a persuasive reason for the Hospital to believe Mr. Kimmett's advice to that effect. The more likely explanation is that Sodexo provided the Hospital with a pretext to cancel the contract, and the Hospital acted on that pretext.

220. In the absence of a legitimate business rationale for the responding parties' conduct at that point in time, I conclude that they were influenced by anti-union *animus*. A comparison of the responding parties' decision-making process with Comcare's underscores this point. Far from taking careful and deliberate measures to analyze, consider and seek to mitigate the effects of an interest arbitration award, as Comcare did, Mr. Kimmett apparently took a rough guess that Sodexo faced a $5 per hour increase to the labour rate, and Ms. Carson accepted his assessment at face value. At this point in the process, far from facing the "certainty of a continuing loss" arising from an interest arbitration award, the responding parties could not even have been certain that there would be an interest arbitration award, let alone one that had severe financial consequences for the responding parties. Even if they did anticipate a substantial cost increase, there was no reason to believe it was imminent. The hasty responses by both responding parties to CUPE's wage proposal suggests a concerted attempt to seize the earliest opportunity to get rid of a trade union they perceived to be a threat to their commercial relationship. The loss of the JCC contract was the ultimate price to be paid to achieve that end, after other attempts by Sodexo to keep

CUPE at bay (through the other methods described earlier) had failed to that point. Clearly, Ms. Carson did not want to go down that path if it could be avoided. The Hospital preferred to deal with one cleaning subcontractor if at all possible, and this was conveyed by Ms. Carson to Ms. Dobbs and Mr. Murphy at their meeting of April 2, 2009. She also conveyed the notion that the cancellation of the JCC contract could be reversed if, in fact, the Hospital did not have to face the prospect of a large price increase.

221. Accordingly, I find that the Hospital's cancellation of Sodexo's contract at the JCC, and Sodexo's layoff of the JCC cleaners, in combination with its earlier efforts to erode employee support for CUPE in favour of LIUNA, constituted violations of the Act, specifically section 70 by both responding parties, and subsection 72(a) by Sodexo. Sodexo orchestrated the cancellation of the JCC portion of the larger contract by conveying to the Hospital an inaccurate and exaggerated warning of an imminent price increase. The Hospital knew or ought to have known that there was no imminent threat to its financial position under the terms of the contract. Nevertheless it promptly served notice of cancellation. In taking this unnecessarily precipitous course of action, HHS was simply acting on behalf of Sodexo to assist Sodexo's avoidance of CUPE as the bargaining agent for one, relatively small bargaining unit. Sodexo sought to interfere in the representation of employees by CUPE, and the Hospital aided and abetted Sodexo in that endeavour, contrary to section 70. The cessation of the JCC portion of the contract was the price to be paid by both responding parties. It bears noting, however, that their commercial relationship did not end as a result. The cleaning arrangements at the other sites, where apparently there was no similar wage pressure being exerted by the respective trade unions there, were not affected.

222. I also find that the layoff by Sodexo of its employees was not the innocent by-product of the Hospital's decision to end the JCC subcontract. The layoffs were the result of Sodexo's orchestration of the Hospital's decision to serve notice of termination of their arrangement at the JCC. As such, they constituted a refusal by Sodexo to continue to employ the JCC cleaners because they were members of the CUPE bargaining unit and were exercising their rights to bargain collectively. That is a violation of paragraph (a) of section 72 of the Act.

223. In closing, I make one further observation. In my view, it would not have been unlawful for the Hospital or Sodexo to have attempted to influence the outcome of Sodexo's collective bargaining with CUPE by pointing out to the CUPE negotiating team that its wage demands, if successfully obtained in full or in part, could or would likely lead to cancellation of the JCC subcontract (and the layoff of the JCC employees) because the Hospital would not tolerate another substantial wage increase. Had Sodexo conveyed such a message to CUPE, thus providing CUPE's negotiating committee an opportunity to consider its position going forward in the bargaining, rather than engineering the subcontract's cancellation after the initial exchange of proposals, the result in this aspect of the case might have been different.

***

224. CUPE seeks other substantial relief arising from the Board's declarations in these matters. The issue of remedial relief is remitted to the parties. If they are unable to resolve the issue, I remain seized to deal with it.

4044-11-G Canadian Union of Skilled Workers, Applicant v. **Hydro One Inc.**, Responding Party.

Construction Industry Grievance – CUSW sought payment for travel time for some of its employees when Hydro One provided transportation for the employees but required one of them to drive the vehicle from the worksite to the agreed-upon assembly point – The Board found no ambiguity in the language of the collective agreement: Hydro One's provision of "transportation" in the form of a vehicle parked for the employees' use, with no one to operate it, meant that one of the employees had to effectively be employed as a driver – Grievance allowed

BEFORE: *John D. Lewis*, Vice-Chair.

APPEARANCES: *Carolyn Hart, Joe Pustina* and *Bill Gilroy* appearing for the applicant; *Scott Williams, Amanda Costa* and *Alex Turpen* appearing for the responding party.

DECISION OF THE BOARD: July 19, 2012

1. This application is a referral of a grievance to the Board for determination under section 133 of the *Labour Relations Act, 1995*, c.1, as amended (the "Act"), commenced by the Canadian Union of Skilled Workers ("CUSW"). The responding party is Hydro One Networks Inc. ("HONI"). The grievance is dated March 13, 2012 and alleges HONI has failed to pay employees assigned to drive a company vehicle from the work location, the Pinard Transformer Station, to the assembly point at Smooth Rock Falls, in accordance with the collective agreement. The grievance seeks a declaration that HONI has violated the collective agreement and an order directing HONI to pay the grievors, who drove the company vehicle, one and half times their regular wage rate, for the time spent driving from the work location back to the assembly point. HONI denies that it has breached the Principal Agreement for Transmission System Construction in the Electrical Power Systems Sector entered into between HONI and CUSW (the "Collective Agreement").

2. This matter came on for hearing on June 12, 2012. At that time the parties indicated to the Board that they had been able to reach a Partially Agreed Statement of Facts. The "Partial Agreed Statement of Facts" is set out as follows:

> **Issue**
>
> 1. The Union takes the position that bargaining unit members who drove trucks from the work site to an assembly point are entitled pay for the approximately one hour travel time. The Employer disputes this position.
>
> **Facts**
>
> 2. The Employer owns and operates an electrical transmission grid in the province of Ontario. The grid is comprised of both transmission lines and transformer stations which are located throughout the province.
>
> 3. The Union and Employer are bound to a collective agreement with a term of May 1, 2001 [sic] to April 30, 2014.

4. In the fall of 2011, the Employer made arrangements for a construction crew, including members of the Applicant's bargaining unit, to perform work at the Pinard Transformer Station ("Pinard T.S.").

5. The Employer arranged for transportation from an assembly point designated by the Employer in Smooth Rock Falls to the work location at Pinard T.S.

6. Travel time from the assembly point to the work location is approximately one hour.

7. At all material times, bargaining unit members had the option of commuting from their residences to Pinard T.S. in their own vehicle or by other means if they so chose.

8. Initially the Employer attempted to arrange for bus transportation for the crew. However, a bus was unavailable during the initial period.

9. During this period, the bargaining unit members were offered the use of the Respondent's trucks to get to the site. Employees travelled to the work location in these trucks. The trucks were not required at the work site. The Employer did not supply drivers for the trucks. Nor does the Employer supply drivers when employees elect to commute from home to the work site.

10. For the purposes of the decision, the parties agree that on occasion, members of the bargaining unit drove the truck from the T.S. to Smooth Rock Falls at the end of the work day.

11. Subsequently, the Employer was able to make arrangements for a bus to be available to take the crew from the assembly point designated by the Employer to the work site and to return them back to Smooth Rock Falls at the end of the day. Members of the bargaining unit do not drive the bus. The bus is driven by a teamster in the employ of Hydro One who is subject to a different collective agreement. Some employees have on occasion elected not to take the bus and commuted in their own vehicles to the work site.

3. In addition to the above Partial Agreed Statement of Facts, HONI called Mr. Alex Turpen ("Turpen") as the sole witness to testify in this matter. Turpen has been employed by HONI for approximately 8 1/2 years. He has spent the last two years as an Area Construction Manager ("ACM"). In that capacity, he was responsible for overseeing the Detour Lake Gold mine project which involved hooking up the gold mine to the Pinard T. S. Turpen testified that he made arrangements for a construction crew, including members of the applicant's bargaining unit, to perform work at the Pinard T. S. In this regard, he arranged for transportation from a location in Smooth Rock Falls to the job site at the Pinard T. S. Smooth Rock Falls became a "declared assembly point" and Turpen attempted to arrange for bus transportation for the crew. However, a bus was unavailable during the initial period of the project. Instead, during this initial period, CUSW members were offered the use of HONI's pickup trucks to get to the Pinard T. S. site.

4. It was Turpen's evidence that employees were not obliged to meet at the Smooth Rock Falls location. At all times, CUSW members had the option of commuting to Pinard T. S. in their own vehicle

or by other means. Moreover, CUSW members were not required to pick up tools nor any materials from Smooth Rock Falls and transport them to the job site at Pinard T. S. using the HONI pickup truck. Turpen testified that the pickup truck was used solely to transport the workers to and from the work location and that HONI had other yard trucks, at the Pinard T. S., which were used to transport tools, material and/or equipment.

5. In cross-examination, Turpen indicated that CUSW members reported to the declared assembly point at approximately 6 a.m. in the morning. Travel time from the assembly point at Smooth Rock Falls to the Pinard T. S. was approximately one hour. Therefore, employees would arrive at work, at approximately 7:00 a.m. It was his understanding that employees took turns driving the pickup truck from the assembly point to Pinard T. S. and then at the end of the day returning back to the assembly point. He indicated that it was his expectation that the individual driving the pickup truck would do a circle check at the start of the day before driving the vehicle. He also indicated that if the driver of the vehicle damaged the vehicle or caused injury to the persons in the vehicle it could give rise to discipline if the driver was operating the vehicle in a negligent fashion.

Relevant Provisions of the Collective Agreement

6. For ease of reference, the relevant provisions of the Collective Agreement are set out below:

> **906 Overtime Rates**
>
> A. When working an eight (8) hour day and five (5) day per week work schedule (Monday to Friday inclusive) overtime work shall be paid at one and one-half (1-1/2) times the wage rate for all hours worked beyond the normal daily scheduled number of hours up to a maximum of two (2) hours per day. All hours in excess of ten (10) hours per day shall be paid at two (2) times the wage rate.
>
> When working on a ten (10) hour day and four (4) day per week work schedule (Monday to Friday inclusive) overtime work shall be paid at one and one-half (1-1/2) times the wage rate for all hours worked beyond the normal daily scheduled number of hours up to a maximum of two (2) hours per day. All hours in excess of twelve (12) hours per day shall be paid at two (2) times the wage rate.
>
> Overtime work performed on Saturday, Sunday, Recognized Holidays and non-shift days shall be paid at two (2) times the wage rate.
>
> Employees who work in excess of twenty four (24) hours continuously will continue to be paid a premium rate for all additional hours worked until such time as the employee receives an eight (8) hour break from work.
>
> **1200 Daily Travel Allowance**
>
> A. The daily travel allowance will be paid by the Employer to their employees who are not living in camp or receiving a subsistence allowance as referred to in Subsection 1201, on the following basis:
>
> Effective May 1, 2008 the following travel rings will be as follows.

(i) If an employee lives within 40 radius kilometers of the work location or declared assembly point* no travel allowance will be paid.

(ii) If an employee lives within 40 to 56 radius kilometers of the work location or declared assembly point, he shall receive $22.51 per day travel allowance for each day worked or reported for. Effective May 1, 2009, the rate will be $23.18. Effective May 1, 2010, the rate will be $23.88.

(iii) If an employee lives within 56 to 80 radius kilometers of the work location or declared assembly point, he shall receive $26.11 per day travel allowance for each day worked or reported. Effective May 1, 2009, the rate will be $26.89. Effective May 1, 2010, the rate will be $27.70.

(iv) If an employee lives within 80 to 97 radius kilometers of the work location or declared assembly point, he shall receive $29.72 per day travel allowance for each day worked or reported for. Effective May 1, 2009, the rate will be $30.61. Effective May 1, 2010, the rate will be $31.53.

(v) If an employee lives greater than 97 radius kilometers from the work location or declared assembly point, and does not qualify for subsistence allowance under Subsection 1201 below, he shall receive $33.06 per day travel allowance for each day worked or reported for provided the employee continues to travel greater than 97 radius kilometers daily. Effective May 1, 2009, the rate will be $34.05. Effective May 1, 2010, the rate will be $35.08.

(vi) When an employee is directed to report to a location that involves travelling around a natural barrier, the distance around the natural barrier shall be the shortest distance measured by a series of straight lines. The sum of the distance of these straight lines shall be applied to the ring concept to establish the employee's travel allowance entitlement, board allowance entitlement and initial and return allowance entitlement.

(vii) A natural barrier is defined as any obstruction or impediment which creates an unreasonable relationship between radius kilometers and actual kilometers travelled.

* For the purpose of this Section, "declared assembly point" is a material yard, field office or other location that may from time to time be designated by the Employer as a location for assembling prior to leaving for the work location.

B. The Employer reserves the right to base daily travel allowance on the distance in radius kilometers from where an employee lives to either the work location or declared assembly point, depending on where the employee is directed to report.

(Note: The Board notes the monetary amounts set out above for Travel Rings and Board and Travel all increase by 3% per year, pursuant to the Memorandum of Agreement entered into between the parties dated September 27, 2011).

1202 Travel Time

A. The Employer will supply transportation between the assembly points and work locations.

B. All travel time will be outside of normal working hours.

C. On normal working days an employee will be paid his/her straight-time rate for all time spent travelling from his/her assembly point to his/her work location.

D. On Saturdays, Sundays and Recognized Holidays identified in Subsection 905 A, B and C, an employee will be paid his/her premium rate for all time spent travelling from his/her assembly point to his/her work location.

E. An employee will travel up to a maximum of one hour on his/her own time when returning from his/her work location to his/her assembly point.

(i) On normal working days an employee will be paid his/her straight-time rate for all time spent travelling in excess of one hour.

(ii) On Saturdays, Sundays and Recognized Holidays identified in Subsection 905 A, B and C, an employee will be paid his/her premium rate for all time spent travelling in excess of one hour.

7. The parties indicated to the Board that should it find the language of the Collective Agreement to be ambiguous concerning the issue in dispute then the Board should remain seized in order to hear past practice evidence as an aid to interpreting the relevant provisions of the Agreement. If the Board, however, did not find the language of the relevant provisions of the Collective Agreement to be ambiguous and found the employer had breached the Collective Agreement, the parties asked the Board to remain seized with respect to the issue of damages. CUSW also stipulated that the grievance was only concerned with the return trip from the work location to the declared assembly point at Smooth Rock Falls. The union did not have an issue concerning how the employer had interpreted the Collective Agreement and compensated the CUSW members who did the driving from the assembly point to the Pinard T. S.

The Position of the Parties

CUSW's Position

8. CUSW took the position that the language of Article 1202 of the Collective Agreement was clear and unambiguous. In this regard, it referred the Board to an excerpt from Brown and Beatty, *Canadian Labour Arbitration*, as well as the Board's decisions in *CUSW* v *Hydro One Inc.* 2010 CanLII

4312 (ONLRB); and *LIUNA, Local 1059* v. *Hydro One Inc.*, 2011 CanLII 35854 (ONLRB), for the various principles of contract interpretation. It also provided the Board with dictionary definitions from the Oxford Canadian Dictionary (2nd ed), for the words "transportation", "travel", "work", and "one's own time".

9. CUSW argued that when one looks at the language used in article 1202 of the Collective Agreement it is apparent that the intent and purpose behind that article was to provide an incentive for employees to work at remote locations. It argued that many of the remote locations have bad roads that are shared by logging trucks and if employees were to use their own vehicle they would be assuming some risk that their vehicle may sustain damage. CUSW submitted that if an employee chooses to use their own personal vehicle to get to the work location, the employee would be entitled to get a travel allowance pursuant to article 1200 of the Collective Agreement. A travel allowance is a different and distinct concept from travel time as set out in article 1202 of the Collective Agreement.

10. CUSW submits that if HONI designates an assembly point, an employee is entitled to a daily travel allowance to the assembly point and then is entitled to get paid travel time for the actual time spent travelling from the assembly point to the work location. This is done in order to assist the employer staff at remote locations; the compromise, however, is that employees while paid for travel time on the way up to the work location do not get compensated for the first hour travelling on the return trip back to the assembly point.

11. CUSW submits that the driver of the company vehicle, on the return trip from the work location to the assembly point, is in fact, working. He or she has the responsibility for safely driving the other passengers. In this regard, the CUSW employee who is the driver, by necessity, has been forced to take on the responsibility and the risk of transporting other members of the crew from the work location to the assembly point in the provided company vehicle. The driver also takes on the risk that he or she could be subject to discipline if there is damage to the company vehicle and/or injury to its passengers on the return trip.

12. The CUSW employee who is the driver, according to the company's interpretation, takes on all the responsibility and risk for free. CUSW argues that this is an absurd result as unionized construction employees do not work for free and it is apparent under the terms of the Collective Agreement that CUSW employees do not perform work for free.

13. It is the union's view that the ordinary and plain meaning of the words "travel", "his/her own time", read in the entire context of article 1202, makes it clear that the driver is not spending his/her own time traveling, but rather, is spending his/her time, by necessity, driving the other members of the crew from the work location back to the assembly point area. The union argues that the driver of the vehicle is no longer on "his/her own time", as the plain and ordinary meaning of that phrase denotes that one is not working and that you are free from any work duties. In the present situation, the driver is not free from performing work duties, as the employer, by only supplying the pickup truck with no driver, has of necessity, forced one of the members of the crew to take on the work responsibilities and risk of being the driver.

14. CUSW argues that if the employer is going to "supply transportation" it must also supply the driver/operator connected with that mode of transportation, otherwise the supply is meaningless. It also leads to the absurd result of forcing, by necessity, an employee to perform the work duties of a driver for free. It is CUSW's position that as the driver is working, outside of his/her normal daily scheduled

working hours, he/she should be entitled to be compensated at time and a half of his/her regular rate, pursuant to article 906A of the Collective Agreement.

HONI's Position

15. HONI submits that Turpen's evidence and the Partial Agreed to Facts, do not reveal that the purpose of article 1202 is an incentive to attract employees to travel to remote locations as alleged by CUSW. In fact, there is no evidence as to what may or may not be the purpose behind article 1202 of the Collective Agreement.

16. HONI submits that it has complied with the precise wording of article 1202 of the Collective Agreement, in that, it has supplied transportation, by way of providing a company pick up truck, that could be used by the employees to travel between the assembly point and work location in this matter. It is the employer's position that article 1202 is clear and unambiguous, in that, an employee is required to travel up to a maximum of one hour on his/her own time when returning from his/her work location to his/her assembly point. In this regard, it notes that the word "employee" in the context of article 1202, has not been given any special definition by the parties. As a result, the word "employee" should be given its plain and ordinary meaning. The word "employee", in its plain and ordinary sense, does not differentiate between a passenger employee or a driver employee. It argues that all travellers in the vehicle are paid straight-time on the way up, regardless of whether they are a driver or a passenger. Likewise, the term "employee" in article 1202E does not differentiate between a passenger employee or a driver employee, and as such, all travellers on the return trip, are obligated to travel up to a maximum of one hour, on their own time, when returning from a work location to the assembly point without compensation.

17. HONI cited and relied upon the case in *Re Nik's Janitorial Services Inc.*, 2001 CanLII 20993 (ON LRB). This decision involved an employee request for review of a decision of an Employment Standards Officer that denied the employee certain compensation, such as travel time. The employer referred to paragraphs 15 and 19 of the decision as follows:

> 15. The remaining issue is Ms. Mino's claim to be paid for travel time from the pick-up point to the job sites, between job sites, and from the job site to the drop-off point at the end of the day. This claim was not made in the request for review of the Employment Standards Officer's decision, but was raised at the hearing. Ms. Mino concedes that she was never told she would be paid for any of the travel time she is now claiming. She wishes to be paid for one or two hours of travel time for each day she worked. The employer's evidence is uncontroverted that no one is paid for any travel time, and never has been. It is simply to provide the employees an easy way of getting to the jobsites, which are usually new construction sites on the edge of the city, that Ms. Bihrer picks up her workers at central locations, and then drops them back there, or somewhere more convenient for the worker, at the end of the day.
>
> 19. This is not a case like *Town & Country Fencing Ltd.*, cited above, as Ms. Mino was not required to come to the pick-up point in order to commence work. Rather, it was in order to give employees a ride to the job site that the employer offered to pick up its workers at convenient pick-up points. Ms. Bihrer was simply making it easier for people to get to and from remote construction sites by picking up and

> dropping off her employees. Had the employees had to get themselves from their homes to the job sites, and then home again at the end of the day, they could not have claimed travel time simply because the job sites were far from their homes. In this case the employer facilitates employees getting to and from work by providing transportation for part of the way. That is not time out of the workday, which does not commence until they reach a job site and begin to unload the van. I am satisfied that Nik's had no obligation to pay Ms. Mino travel time from the point of pick-up to the first job site, nor from the last job site to the drop-off point. There is therefore no payment due to Ms. Mino for travel time from the pick-up point to the first job site or from the last job site to the drop-off point.

18. By analogy, like in *Re Nik's Janitorial Services Inc. supra*, HONI argues that CUSW employees are not required to attend at the assembly point in order to be transported to the work location. Rather, employees have the option of travelling to the work location in their own vehicles or meeting at the assembly point and using the mode of transportation supplied to them by the employer, namely, the company pickup truck. As such, when an employee is commuting from the assembly point to the work location, and *vice versa*, it cannot be said that they are working.

Legal Analysis and Decision

19. In the decision of *LIUNA, Local 1059* v. *Hydro One Inc., supra*, the Board, at paragraphs 37 - 39 outlined the general principles of interpreting the language of a collective agreement as follows:

> 37. In previous Board decisions, in which the Board has been required to analyze and interpret the language of a collective agreement, the Board has made the following comments, with which we agree and adopt:
>
> > 14. The Board is thus required to analyze and interpret the language of the collective agreement. A collective agreement is a contract. As described in *Canadian Labour Arbitration Third Edition* (D.J.M. Brown and D.M. Beatty, Aurora: Canada Law Book, 2003) at p. 4-42, an arbitration tribunal's task in interpreting a collective agreement is no different than that faced by other adjudicators in applying statutes, private contracts and other authoritative directives. The general principle for interpreting contracts is that the tribunal should "search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract": *Consolidated-Bathurst Export Ltd.* v. *Mutual Boiler & Machinery Ins. Co.*, (1979), 112 D.L.R. (3d) 49 (S.C.C.) at p. 58; see also *Hillis Oil & Sales Ltd.* v *Wynn's Canada Ltd.*, [1986] 1 S.C.R. 57. *Hamilton and District Sheet Metal Contractors Inc.*, [1981] OLRB Rep. June 672, *The Corporation of the City of Sault Ste. Marie*, [1994] OLRB Rep. April 496. The contract should be construed as a whole, giving effect to all of its terms, so long as this does not result in an absurdity: *Holt* v. *Corporation of the City of Thunder Bay*, (2003) 65 O.R. (3d) 257 (C.A.) at p. 263. *Belleville Police Services Board* (2000), 91 L.A.C. (4th) 99 (Goodfellow). The contract must also be interpreted with a view to the labour relations considerations involved, and in particular, the practical realities of the construction industry: *Provincial International Cranes Inc.*, [1998] OLRB Rep. Nov./Dec. 1004.

(see *Bruce Power LP*, [2004] OLRB Rep. May/June 479, paragraph 14).

38. The Board's jurisprudence also establishes that the ultimate admissibility of a past practice as an aid to interpretation depends on a finding that there is an ambiguity, either patent or latent, in the disputed wording. If the wording is not ambiguous then extrinsic evidence in the form of past practice is not admissible as an aid to interpretation and must be disregarded (see *Black & McDonald Ltd.* [2001] OLRB Rep. November/December 1353; *Re DHL Express (Canada) Ltd.* 124 L.A.C. (4th) 271).

Is There An Ambiguity

39. The Board also agrees with the general principle of contract interpretation that the parties intended to use the words they have used. The words of a collective agreement must be given their plain and ordinary meaning unless the context of the particular provision or collective agreement, read as a whole, suggests that a different or special meaning is intended. All words must be given meaning, and different words are presumed to have different meanings, unless this would lead to a result that is absurd on inconsistent with the overall scheme and structure of the agreement. (See *Hi-Tech Group Inc. v. Sears Canada Inc.* 2001 Can LII 24049 (Ont. C.A.), (2001) 52 O.R. (3d) 97).

20. Applying the above general principles of contract interpretation to the facts in this case, the Board finds that Article 1202 is clear and unambiguous. The Board finds that the language of article 1202E does not operate to deprive the CUSW employee who did the driving from compensation for the first one hour when returning from the work location to the assembly point.

21. The Board finds that the decision in the *Re Nik's Janitorial Services Inc. supra*, relied on by the employer, is clearly distinguishable from the facts in this grievance. The Board notes that the decision is an *Employment Standards Act* appeal and that it did not involve the interpretation of a collective agreement involving travel time pay. The Board would also note that in that decision Ms. Bihrer, the individual who ran the business, was the individual who actually transported and drove the crew of employees to the various worksites daily. It was Ms. Bihrer, and not the employees in their capacity as passengers, who facilitated the crew getting to and from work by providing transportation.

22. In interpreting the language used by the parties in article 1202, the Board is of the view that if HONI decides to declare an assembly point, Article 1202A clearly obligates it to "supply transportation" between the assembly point and work location. The Oxford Canadian Dictionary defines "transportation" as "the act or process of transporting something; conveyance of people, goods, etc." In agreeing to convey employees, HONI has agreed to take or carry them from one place to another. In its plain and ordinary sense, the employer has agreed to provide employees, who arrive at the designated assembly point, with a ride. In agreeing to provide the employees with a ride, it is implicit that the employees are obviously passengers and that the employer is responsible for taking the necessary steps to ensure the employees, in their capacity as passengers, are conveyed to and from the assembly point and work location. If HONI had chartered a plane in order to take employees from a designated assembly point to a work location, it would be absurd for the employer to advance the argument that it had "supplied transportation", if the plane did not come with a pilot to fly it. Similarly, if HONI had arranged for a

train, to take employees from a declared assembly point to a work location, one would not expect one of the CUSW employees to take on the role of the train's engineer. While the above examples are somewhat extreme they serve to illustrate the point that in agreeing to provide a ride the parties intended the employees to be passengers.

23. In the present fact scenario, leaving a pickup truck at the declared assembly point, with no driver provided for the vehicle, in effect, required one of the employees to take on the responsibilities of being the driver, while the others remained passengers. The Board agrees with CUSW's position that if the employer is going to "supply transportation" it must also supply the driver/operator for that mode of transportation, otherwise the supply is meaningless and leads to the absurd result of forcing, by necessity, a CUSW employee to perform the work duties of a driver for free on the return trip from the work location to the assembly point. Had the employer provided a bus or other means of transportation, it would certainly have paid that driver for the time spent transporting the CUSW passengers. As set out in paragraph 11 of the "Partial Agreed Statement of Facts", the Board is certain that the Hydro One teamster, who eventually was assigned to drive the bus, received compensation for performing those duties. The Board finds that the employer has breached the Collective Agreement by not providing compensation to those employees who performed the driver duties on the return trip from Pinard T. S. to the assembly point at Smooth Rock Falls.

24. The Board remains seized with respect to the issue of damages should the parties not be able to agree on what is the appropriate compensation that results from the employer's breach of the Collective Agreement.

2698-11-G; 3145-11-G Canadian Union of Skilled Workers, Applicant v. **Hydro One Networks Inc.**, Responding Party.

Collective Agreement – Construction Industry Grievance – The Union filed grievances claiming that the employer had violated the collective agreement by failing to transfer two grievors closer to their regular residences – The issue before the Board was the interpretation of Article 802 C of the collective agreement which states that 'The Employer will make every reasonable effort to transfer employees as near as possible to their regular residences as work permits' – The Union argued that there was plenty of work available in the requested zone and that the employer failed to make 'every reasonable effort' to transfer W and A closer to their respective regular residences – The employer argued that the words 'as work permits' means that the employer only has to make every reasonable effort if there is a lack of work in the zone the employee is transferring from and there is work available in the requested zone – The employer submitted that at the time of the request, they had lost experienced workers and could not afford to transfer out any workers – The Board held that Article 802 C of the collective agreement includes not only an assessment by the employer of available work in the requested zone, but also the amount of work in the zone from which the transfer would be made – The Board dismissed A's grievance on the basis that a verbal request for a transfer is insufficient to engage Article 802 C – The Board dismissed W's grievance on the basis that it was not possible for the employer to accommodate a transfer as it had very recently experienced the loss of a number of journeyman electricians in the zone from which A wished to transfer – Grievances dismissed

BEFORE: *Gail Misra*, Vice-Chair.

APPEARANCES: *Carolyn Hart, Paul Wynne, Winston Allison* and *Gerry Weir* for the applicant; *Scott Williams, Amanda Costa, Brian Priestap* and *Heather White* for the responding party.

DECISION OF THE BOARD: August 15, 2012

1. These are applications filed under section 133 of the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended.

2. The style of cause in these matters is hereby amended to reflect the correct name of the responding party: "Hydro One Networks Inc." As requested by the applicant, the Board notes for the record that Hydro One Inc. and Hydro One Networks Inc. are related employers under the Act as found in *Ontario Hydro Services Company/Hydro One Inc.*, [2003] OLRB Rep. Sept./Oct. 872.

3. On October 11, 2011 the applicant Canadian Union of Skilled Workers ("CUSW" or the "union") filed a grievance on behalf of Gerard Weir claiming that Hydro One Networks Inc. ("HONI" or the "employer") had violated Article 802 C of the collective agreement by failing to transfer Mr. Weir closer to his regular residence. The remedy the union was seeking was for the grievor to be transferred closer to his regular residence. This grievance became the subject of Board File No. 2698-11-G.

4. On November 9, 2011 the union filed a grievance on behalf of Winston Allison claiming that the employer had violated Article 802 C of the collective agreement by failing to transfer Mr. Allison closer to his regular residence. The remedy the union was seeking was that the grievor should have his Employment Commencement Date ("ECD") returned to his original date (as will be explained below). This grievance became one of the subjects of Board File No. 3145-11-G. The Board notes the parties' agreement that the two other grievances which were also the subject of this Board File have been resolved.

5. The parties agreed to combine the two referrals to arbitration and to have them heard together.

6. There was no dispute about most of the basic facts underlying these grievances. Hence, the parties agreed on a number of facts and the employer called one witness. The issue to be decided is the interpretation of Article 802 C of the collective agreement.

The Gerard Weir Grievance

7. The parties have agreed that the employer will divide the province of Ontario into five geographic zones for work related to stations. The zones are Eastern, Central, South Western, North Western and North Eastern.

8. Mr. Weir is a journeyperson electrician who regularly resides in the Central Zone. However, he began working for HONI in the South Western Zone. On August 30, 2011 Mr. Weir submitted a Request for Transfer form to move to the Central Zone to bring him closer to his home. Mr. Brian Priestap, the Area Construction Manager ("ACM") for the South Western Zone, processed but denied the transfer request as there was work available in that zone at that time. Mr. Priestap did not feel he could spare Mr. Weir and remove him from the crew with which he was working. Furthermore, he was not aware of any compassionate reason to consider Mr. Weir's transfer request.

9. On September 20, 2011 Mr. Greg Chaffey, the Area Construction Manager of the Central Zone, submitted a request to the CUSW hiring hall to refer eighteen (18) journeyperson electricians to commence work in the Central Zone on October 3, 2011.

10. When it became clear that Mr. Weir was not going to be transferred to work closer to his residence despite the employer needing 18 journeyperson electricians in the Central Zone on October 3, 2011, the grievance was filed on his behalf on October 10, 2011.

11. Mr. Weir was ultimately transferred to the Central Zone in April 2012. As such, the remedy the Union is seeking in this grievance is a declaration that the employer violated Article 802 C of the collective by failing to transfer Mr. Weir closer to his home when work permitted it to do so in September 2011.

The Winston Allison Grievance

12. Mr. Allison is a journeyperson electrician who regularly resides in the Central Zone. However, he began working for HONI in the South Western Zone in or about March 2010.

13. According to Mr. Allison and the union, sometime before September 20, 2011 Mr. Allison spoke to a senior foreperson, Mr. Bryce, to request a transfer to the Central Zone to be closer to home rather than working in Chatham. At that juncture Mr. Allison was aware that the employer was going to be hiring journeyperson electricians in the Central Zone. Mr. Bryce apparently told Mr. Allison that he could not get a transfer. Mr. Allison did not complete and submit to the ACM a Request for Transfer form as he was not given one.

14. On or about September 21, 2011 Mr. Allison was aware that the employer was seeking 18 journeyperson electricians from the union to work in the Central Zone. Since he had been told that he could not get a transfer, he quit his job at HONI in the South Western Zone on September 21, 2011, and went on the union's hiring hall out of work list. Mr. Allison was subsequently referred by the union to the employer for the Central Zone job that was to commence on October 3, 2011.

15. The employer does not agree with Mr. Allison's version of events in respect of his having spoken to Mr. Bryce to request a transfer, nor that Mr. Bryce told Mr. Allison that he could not get one. However it has no evidence to rebut Mr. Allison's version.

16. Mr. Priestap testified that he had never been made aware that Mr. Allison wanted a transfer to the Central Zone, nor had he ever received a Request for Transfer from Mr. Allison. Nonetheless, he agreed that had he received a Request for Transfer from Mr. Allison, his response would have been the same as it had been for Mr. Weir: He would have denied the request as he had work available for Mr. Allison in the South Western Zone at that time, and he was not aware of any compassionate reason upon which this grievor may have wanted to transfer to be closer to home.

17. By quitting his employment with HONI in the South Western Zone, Mr. Allison lost almost two years of accumulated seniority he had with the company. Apparently an employee only retains seniority if s/he remains employed, or is laid off for less than 6 months before being recalled to HONI. Once an employee is laid off for more than six months consecutively or quits, s/he loses accumulated seniority.

18. Mr. Allison began work for HONI in the Central Zone on October 3, 2011. A grievance was filed on his behalf on November 9, 2011 seeking a return of his original ECD (which is essentially his last date of hire for the purposes of accruing seniority). In the union's view, since Mr. Allison had been denied a transfer, he had had to quit HONI in the South Western Zone in order to go to work for HONI in the Central Zone as a new hire. As a result, he lost his original ECD of March 26, 2010. The Union contends that had this grievor been permitted to transfer, he would have retained his ECD, rather than starting over as a new employee.

19. Mr. Allison was subsequently laid off for lack of work in the Central Zone in December 2011. He was not recalled to HONI thereafter.

20. In Mr. Allison's grievance the union is seeking a declaration that the employer has violated the terms of the collective agreement, and in particular Article 802 C, and is seeking to have Mr. Allison's original March 26, 2010 ECD reinstated as the union argues that Mr. Allison should not have had to quit in order to get a job in the Central Zone.

Other relevant evidence

21. The two grievances are with respect to employees working in station construction for this employer. HONI has stations spread out throughout each of its zones. Each zone covers a vast area of the province. For the purposes of these grievances it is noteworthy that the Central Zone's western border is from north of Owen Sound, south through Milton, and continuing south to just west of Oakville. The South Western Zone is the area west of that line of demarcation, and up to the United States border. Thus, even if an employee lives and works in a zone, there is no assurance that they would be working close to their regular residence.

22. Mr. Priestap, the employer's Area Construction Manager for the South Western Zone responsible for station construction, testified about the transfer process. He indicated that an employee may first speak to his or her foreperson or senior foreperson, or a union steward, to express an interest in transferring to another zone. The employee is then provided with a Request for Transfer form to complete and submit to the Area Construction Manager for consideration. The ACM signs and dates the form, and indicates on the form whether he can accommodate the transfer request or not. He then submits the form to the Workforce Acquisitions department, which tracks the form and puts the person's name on the transfer list where it is held for up to one year.

23. Nothing in the collective agreement mandates the use of a transfer form, but this has been the employer's established practice for some time. The practice is not the subject of these grievances.

24. Mr. Priestap also testified about the HONI practice regarding the consideration of employee transfer requests. In considering a Request for Transfer, there are two ways in which an employee may be transferred: the first is if there is diminishing work, or a lack of work, in the zone the employee wishes to transfer from, and there is work available in the zone the employee wishes to transfer to; and, the second consideration is whether there are compassionate reasons to try to accommodate a particular transfer request. Mr. Priestap stated that at the time at which he would be reviewing a transfer request he would have no idea whether there would be work available in the zone to which the employee wishes to transfer. It is up to Workforce Acquisitions to check with other ACMs to see if there is work available for the person seeking a transfer.

25. The employer conceded that there are no specific examples of its historic practice of the application of the two considerations Mr. Priestap testified about. The union conceded that it was not suggesting that the employer has given employees transfers whenever they have been requested, but it is challenging the employer's bases for granting transfers and takes the position that HONI is in violation of the terms of the collective agreement.

26. Once a transfer request is registered with Workforce Acquisitions, and when another zone is hiring, Workforce Acquisitions staff contact the ACM for the zone that an employee wishes to transfer from to ask if the transfer can be accommodated at that time. The ACM then has the opportunity to consider whether to agree to the transfer or not, knowing that there is a job for the worker to transfer to.

27. In order to request workers from the union when there is a need, the employer completes a "Construction Services Help Requisition" form. It was the employer's evidence that on the HONI Construction Services Help Requisition form there is a question that asks "Has the Request for Transfer list been reviewed? Yes /No". Thus, any ACM wishing to make a request to the CUSW hiring hall for new workers is supposed to first review the list of HONI's existing employees who have requested transfers to that particular zone.

28. When Mr. Chaffey, ACM for the Central Zone, submitted his initial request for 18 journeyperson electricians, the form dated September 20, 2011, indicates that the Request for Transfer list had not been reviewed.

29. Mr. Chaffey's request was later reduced to 16 journeyperson electricians because two such electricians were in fact transferred to the Central Zone from other zones. There is no dispute that the sixteen journeyperson electricians ultimately hired as a consequence of the September 20, 2011 request were persons regularly residing in the Central Zone.

30. Mr. Priestap testified that a number of journeyperson electricians quit from his zone between late August and late September 2011, many to go and work in the Central Zone as a result of the September 20, 2011 Construction Services Help Requisition (the "September 20th Help Requisition") issued by Mr. Chaffey. As a result of that loss of journeyperson electricians, and because there was an increase in the South Western Zone's work, Mr. Priestap had to hire new electricians in his zone in mid-October 2011.

31. It was the employer's evidence that a newly hired electrician at HONI needs 96 hours of training to be ready for the job. The training includes new employee orientation, and courses regarding Liquid Spills, Health and Safety Incident Reporting, Emergency Preparedness, CPR, AED (regarding the use of a defibrillator), and Medical Responses. The CPR, AED and first aid training take about 16 hours and are provided by an outside trainer, so it is only available when a course is being offered. Many of the courses that the employer provides to journeyperson electricians must be renewed from time to time, so that even an employee who has been working at HONI for some time may need to do a course again to update his or her training profile.

32. Each zone has its own training budget. However, Mr. Priestap testified that the cost of training is not a consideration when deciding whether to agree to an employee's transfer request; his prime consideration is whether he has work for that individual.

33. Evidence was led about the training provided to the 16 electricians who were hired through the union hiring hall and the two who were transferred to the Central Zone. Of the sixteen journeyperson electricians hired through the hiring hall, four needed the full new employee orientation; one needed

about 16 to 20 hours of training; nine electricians required between one and two days of training to be ready for the job; and the remaining two required no training at all (Messrs. McLeod and Bhatia, who had quit the South Western Zone to get jobs in the Central Zone). The group of nine electricians who needed between one and two days of training included two electricians who had also quit from the South Western Zone to take jobs in the Central Zone (and included the grievor Mr. Winston Allison).

34. As noted earlier, two persons were transferred to the Central Zone. Mr. Lavechia, a journeyperson electrician from the South Western Zone, needed no training, and Ms. Barlow needed about one day's training. It was the employer's evidence that Mr. Lavechia was transferred for compassionate reasons to permit him to be closer to his child who was in the hospital at the time. Ms. Barlow was permitted to transfer because her ACM had indicated that there would be less work available in his zone and Ms. Barlow would be laid off, so he authorized the transfer.

35. It was the employer's evidence that once an employee has been through whatever training is required, he or she goes to the worksite and receives about one day of site-specific training, which includes orientation to the site, site specific safety information and an introduction to the site's emergency plan.

36. Mr. Priestap testified that there is a cost to a zone when it has to transfer a worker to another zone as it has to pay for travel time between the worker's last work site and the one s/he is being transferred to. Such payments are both at the kilometre rate and for the length of time to travel, but only on the first trip of that worker to the new site. These transfer payments are also paid when the employer requires that a worker be moved between job sites within a zone.

37. There is little evidence before the Board regarding what Workforce Acquisitions did regarding Mr. Weir's transfer request, or how it came about that he was not ultimately permitted to transfer to the Central Region as a result of the need for 16 journeyperson electricians in late September 2011. Mr. Priestap testified that he did not know what Workforce Acquisitions had done with the Weir request, but that there would usually be some communication to him about whether he had anyone available for transfer when people are required in another zone. While Mr. Priestap could not recall specifically whether that had occurred with respect to the Weir request on the September 20th Help Requisition, he did recall that he had been consulted by Workforce Acquisition about Mr. Lavechia's transfer request, to which he acceded on compassionate grounds as Mr. Lavechia had spoken to him about his particular family situation.

Parties' submissions

38. For ease of reference, Article 802 in its entirety is reproduced below:

> A. The Employer reserves the right to transfer employees to meet its needs, having regard for the special requirements of transmission, transformation and Miscellaneous Projects construction The Employer shall provide transportation or pay the equivalent of the cost of public transportation or mileage ($0.40/km effective May 1, 2008; $0.42/km effective May 1, 2009; $0.44 effective May 1, 2010), whichever is deemed appropriate by Management for the initial trip to the new work location from the employee's most recent work location. The Employer may only elect to provide transportation when no reasonable means of public or personal transportation is available to the transferring employee. The

> Employer shall also pay travelling time relative to the mode of transportation at straight-time up to a maximum of ten (10) hours per day.
>
> B. Employees who are receiving subsistence allowance shall be notified of their transfer when possible, at least two (2) working days prior to their last day of work at the transferring location.
>
> C. The Employer will make every reasonable effort to transfer employees as near as possible to their regular residence as work permits. Employees relocated as a result of the implementation of the seniority clause will not be eligible for transfer under this section until the earliest of the end of the project to which the employee is transferred or the employee is transferred to another project to which clause 802C does not apply.

39. The union argues that the employer has violated the terms of the collective agreement because it did not make "every reasonable effort" to transfer Messrs. Weir and Allison closer to their respective regular residences when there was plenty of work available for them in the Central Zone, and when the employer had to hire 16 people through the hiring hall to do the work in question. It posits that since the two grievors were journeyperson electricians, and the employer was seeking journeyperson electricians, the employer could have transferred the grievors, and hired new electricians, if necessary, in the South Western Zone. In order to ensure that the South Western Zone did not suffer losses in the grievors' crews, the employer could have hired and trained two individuals before moving the grievors to the Central Zone.

40. The union urges the Board to find that the employer's two considerations on transfer requests fall far short of the collective agreement requirement that the employer "make every reasonable effort".

41. The employer argues that the pertinent language of Article 802 C is in the phrase "as work permits", which it states means that the employer only has to make every reasonable effort to transfer employees as near as possible to their regular residences if there is a lack of work to be done at the zone the employee is transferring from, and there is work available in the zone to which the employee wishes to transfer. It further states that Article 802 C puts on HONI an ongoing obligation to bring all employees closer to their regular residence because there is no mention in the language of an employee having to make a request. It is for this reason that it argues that work availability in both the zone from which an employee seeks a transfer and the zone to which the employee wishes to go are pertinent.

42. The union stated that it has been understood by the parties that there is no ongoing obligation on the employer to transfer all employees as near as possible to their regular residence. Rather, it has always been understood that in order to activate Article 802 C an employee would need to request a transfer to be closer to home. However, the union states that it had not agreed to the Request for Transfer form, and does not believe that it is necessary for an employee to have to complete such a form in order to express a desire to transfer.

43. The employer argues that it needs to maintain continuity within its crew complement when on a job, and that it should not have to deal with the "churn" which would occur if the employer has to keep hiring, training, and then transferring employees who wish to work closer to home.

44. The union counters this argument by pointing out that nothing in Article 802 C gives the employer the right to consider training or other costs when it has to make "every reasonable effort" to transfer employees closer to their homes. It points out that those who were hired in the Central Zone pursuant to the employer's September 20th Help Requisition were all from the Central Zone, and none of them was seeking a transfer, so there is no evidence that the employer would constantly have to move and retrain employees. Furthermore, the union states that the maximum training that the employer would have to provide would take about two weeks for a new employee. In this instance the vast majority of those referred to the employer required between no training and two days of training, which the union argues is not onerous given the employer's requirement that its own employees have to do refresher courses in order to remain current in some areas.

45. HONI states that the Central Zone was only seeking electricians for six to eight weeks, so that a transfer of the grievors to the Central Zone would not have been practical since the grievors were already working on specific jobs in the South Western Zone. Also, if the employer has to decide about a transfer before it puts its request in to the union hiring hall, then it has to make a decision when it does not know whether there will be a need for the transferring employee by the date of the actual transfer. As an example the employer posits that if it had decided by September 20, 2011 to transfer the two grievors, but then by October 3, 2011 it had urgent work that had to be done by the grievors and so could not effect the transfer from the South Western Zone, that would leave the Central Zone short by two people for the crews it was trying to assemble. The employer also points out that if a crew is incomplete because of the transfer of one or more persons, that crew's work could be held up for up to two weeks while new employees are trained.

46. The union countered these concerns by noting that the employer is given a list of the persons who will be sent to it two days in advance of the start date. At that juncture the employer can check the training status of those being sent, and can amend its request to the union in order to ensure that it gets more persons who need less training, or it can decide whether to accept a transfer-seeking employee from another zone. In the particular circumstances of the September 20th Help Requisition, the union notes that the employer in fact did amend its request twice to reduce the request from 18 to 17, and then again from 17 to 16, as it made decisions about transferring Mr. Lavechia and Ms. Barlow to the Central Zone from other zones.

47. The union further states that if there was an emergency that required the skills of an employee who had already been authorized by the employer to transfer, then the union would agree that the employee had to remain in his or her zone because despite the employer having made every reasonable effort to transfer the employee, the work would not permit the transfer of the employee in those circumstances.

48. The employer argues that it would be unfair to require new hires in the Central Zone to have to move to another zone in order to facilitate a transfer as this would only cause some other employee to have to work further away from his or her residence. The union response to this argument is that it is more unfair that existing HONI employees are not permitted to move closer to home when the employer has a need for workers in their home area. It argues that to accept this argument would mean that Article 802 C has no meaning or use. Instead, the union states, the employer could have reduced its request by two, and could have made a request to hire two or three (if one includes Mr. Lavechia) journeyperson electricians in the South Western Zone.

49. Both parties argued about the significance of the Board's decision in *Hydro One Inc*, [2010] O.L.R.D. No. 3262, (the "*Hydro* One decision") which in part addressed Article 802 C. The union

urges the Board to adopt the reasoning in that decision. The employer argues that the Article 802 C analysis is *obiter* and should not be considered.

Decision

50. The main issue in these grievances is the interpretation of a part of Article 802 C, which for ease of reference is reiterated here:

> 802 C. The Employer will make every reasonable effort to transfer employees as near as possible to their regular residence as work permits. ...

51. In previous decisions in which the Board has been required to analyze and interpret the language of a collective agreement, it has made the following comments, with which I agree and which I adopt:

> 14. The Board is thus required to analyze and interpret the language of the collective agreement. A collective agreement is a contract. As described in *Canadian Labour Arbitration Third Edition* (D.J.M. Brown and D.M. Beatty, Aurora: Canada Law Book, 2003) at p. 4-42, an arbitration tribunal's task in interpreting a collective agreement is no different than that faced by other adjudicators in applying statutes, private contracts and other authoritative directives. The general principle for interpreting contracts is that the tribunal should "search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract": *Consolidated-Bathurst Export Ltd.* v. *Mutual Boiler & Machinery Ins. Co.*, (1979), 112 D.L.R. (3d) 49 (S.C.C.) at p. 58; see also *Hillis Oil & Sales Ltd.* v. *Wynn's Canada Ltd.*, [1986] 1 S.C.R. 57. *Hamilton and District Sheet Metal Contractors Inc.*, [1981] OLRB Rep. June 672, *The Corporation of the City of Sault Ste. Marie*, [1994] OLRB Rep. April 496. The contract should be construed as a whole, giving effect to all of its terms, so long as this does not result in an absurdity: *Holt* v. *Corporation of the City of Thunder Bay*, (2003) 65 O.R. (3d) 257 (C.A.) at p. 263. *Belleville Police Services Board* (2000), 91 L.A.C. (4th) 99 (Goodfellow). The contract must also be interpreted with a view to the labour relations considerations involved, and in particular, the practical realities of the construction industry: *Provincial International Cranes Inc.*, [1998] OLRB Rep. Nov./Dec. 1004.
>
> (see *Bruce Power LP*, [2004] OLRB Rep. May/June 479, paragraph 14).

52. Thus, the Board's task is to consider the words used by the parties and to give those words their plain and ordinary meaning having regard to the overall context of the collective agreement. In addition, effect should be given to all of the words used unless such an interpretation leads to an absurdity.

53. In the *Hydro One* decision, cited above, the Board addressed Articles 802 C and 804 B of the same collective agreement that is in issue here. In that case the grievor had been transferred by the employer from the Northern Zone to the Central Zone, and had made a written request to return in order

to be closer to his regular place of residence. The grievance arose when the grievor was not given a transfer closer to home when there was work available in that zone. The Board found that there had been a violation of Articles 802 C and 804 B in that instance.

54. The Board noted at para. 10 of the decision that Article 802 C did not provide a mandatory obligation on the employer to do anything, but rather required that the employer make "every reasonable effort" conditional on the availability of work in the employee's home area and the employee's ability to do that work. I agree with the Board's analysis as found at paras. 14 and 15 of the decision where it stated:

> 14. Section 802 provides a somewhat more onerous obligation on the Hydro One than section 804. Hydro One's primary obligation is to make "every reasonable effort" to transfer employees as near as possible to their regular residence. The only identified restriction is the final phrase "as work permits", i.e. that there is work available and the employee can perform the available work. This is a fairly narrow set of considerations in the context of this Collective Agreement and in this particular section. In Section 802 A, Hydro One reserves the right to transfer employees "having regard to the special requirements of transmission, transformation and Miscellaneous Projects construction". That phrase suggests a great range of appropriate considerations. The narrower term used in section 802 C is "as work permits", identifies a very narrow range of considerations that might otherwise relieve the Employer of its obligation to use "every reasonable effort".
>
> 15. The primary obligation in Section 802 C is to make every reasonable effort to transfer an employee close to home. That is the primary focus of the section. The phrase "as work permits" is a narrowly worded limitation on that general obligation. It would be improper to transform the one limiting factor, "as work permits", into the primary focus of the sentence. To do that would be to deprive the principle clause of the sentence, "make every reasonable effort", meaningless. Hydro One is required to make every reasonable effort to transfer employees nearer to home when it can.

55. In the two grievances now before the Board the question is whether, as part of its assessment of whether "work permits" the employer can also give consideration to work in the zone *from* which an employee wishes to transfer. Hence, inherent in assessing the employer's application of Article 802 C is the question of whether it would be unreasonable to consider the availability of work in the area from which the employee wishes to transfer. In my view it is not unreasonable or counter-intuitive for the employer to consider whether it can spare a worker who wishes to transfer from one zone to another. This is especially so where, as here, both the grievors had applied for and taken work in the South Western Zone knowing that it was far from their respective regular residences. This fact distinguishes these grievances from the one before the Board in *Hydro One*, cited above.

56. Reading Article 802 as a whole, it is clear that Article 802 A reserves to the employer the right to transfer employees any time it needs to for the special requirement of transmission, transformation and Miscellaneous Projects construction. Article 802 B addresses the amount of notice of an impending transfer that should be given to employees. The remainder of Article 802 C (other than what has already been discussed above) indicates the conditions under which employees who are transferred pursuant to

the implementation of the seniority clause of the collective agreement may request a transfer back to be closer to their homes.

57. It is these latter conditions in Article 802 C that are noteworthy as they help to define what the first sentence of this article must mean: the parties have agreed that if an employee is transferred as a result of the application of the seniority clause, that employee "will not be eligible for transfer under this section until the earliest of the end of the project to which the employee is transferred or the employee is transferred to another project to which clause 802 C does not apply". Thus the parties have specifically agreed that in certain circumstances it is only at the end of a project, or when the work ends, that an employee can be granted a transfer to be closer to home. It also suggests that "work permits" in the first sentence of Article 802 C may encompass a consideration of when a project ends or an employee would otherwise be laid off from the zone s/he wishes to transfer from. However, even if I am incorrect in this regard, it is inherent in the employer's need to make "every *reasonable* effort" that HONI has the right to take into account legitimate considerations. These may include the work that has to be done in the zone from which the transfer would be made, the urgency of particular work that may have to be done, and whether there are personnel shortages being experienced in that zone.

58. The parties have not agreed on any particular protocol regarding how an employee identifies an interest in a transfer, but I am satisfied for the purposes of these grievances that there is a practice of employees completing a Request for Transfer form, which is then submitted to an ACM, and is subsequently passed on to Workforce Acquisitions where the request is noted and held for a year. The current process seems to have been accepted by the union for some time. As a practical matter, in order for the employer to meet its collective agreement obligation to make every reasonable effort to transfer employees closer to their homes it must have some transparent and verifiable process of keeping track of transfer requests, and it would appear that this is the system it has chosen. Furthermore, the union has not objected to this system.

59. Turning to the specific facts of the grievances, I find that Mr. Allison never submitted a Request for Transfer, and as a result, the employer had no record that he wished to transfer. I am not satisfied that a verbal request for a transfer is sufficient to engage Article 802 C. As such, the grievance must fail as the grievor had not identified to the employer in writing that he wished to transfer. The Allison grievance is hereby denied.

60. Mr. Weir had submitted a transfer request as is envisaged by the employer's transfer process. His request had been noted by Workforce Acquisitions, and the employer was aware that he was seeking a transfer to the zone in which he regularly lived. The employer had between sixteen and eighteen jobs available in the Central Zone, and Mr. Weir was qualified to do the work available. Yet, prior to making its Help Requisition to the union on September 20, 2011, the employer had not considered who was on its transfer list seeking to work in the Central Zone. It would appear that at some point after it had made the help request to the union the employer did review its transfer list, and then determined to transfer two journeyperson electricians from other zones as a result of their respective transfer requests. It did not transfer Mr. Weir as it determined that his services were still needed in the South Western Zone.

61. For the reasons already outlined above, I find that HONI had the right, as part of its requirement to make "all reasonable efforts", to consider whether there was work that it needed Mr. Weir to do in the South Western Zone, and thus whether it could transfer him or not. This was especially so where the South Western Zone had already experienced the loss of a number of journeyperson electricians in the immediately preceding period. As the union itself recognized, there will be instances in which work situations may thwart the employer's efforts to transfer an employee. That is recognized in

the language of "reasonable effort" and can legitimately be a part of the employer's consideration when addressing a transfer request.

62. In this instance, while there was work available in the Central Zone, and while Mr. Weir had all the qualifications for the work available, the South Western Zone had lost five workers who had quit, and had one more who needed a transfer to the Central Zone on compassionate grounds, so its ACM could not see how he could afford to let one more journeyperson electrician transfer out.

63. The evidence is that due to the number of electrician positions available in the South Western Zone the employer ultimately had to hire a number of new employees in that area in October 2011. Mr. Weir was a fully trained HONI employee who was already a part of a crew and it is understandable in all the circumstances that the employer wished to retain him where he was.

64. Having regard to the language of the first sentence of Article 802 C, I am satisfied that in this instance the employer made every reasonable effort to transfer Mr. Weir closer to his residence, but that given the number of journeyperson electricians who had left the South Western Zone in the weeks before October 3, 2011, it was not possible for the employer to accommodate one more transfer at that juncture. As such, the Weir grievance is hereby denied.

1284-12-M Labourers' International Union of North America, Local 506, Applicant v. **James Dick Construction Limited, James Dick Holdings Limited, Caledon Sand & Gravel Inc., Hamilton Ready Mix Ltd., Assinck Limited**, Responding Parties.

Certification – Interim Relief – Practice and Procedure – Unfair Labour Practice – The Labourers sought interim reinstatement of K – As the employer conceded there was a serious issue to be tried and the circumstance occurred during an organizing campaign, the remaining issues were irreparable harm and balance of harm, and whether the termination of K was unrelated to the exercise of rights under the Act – Procedurally, the Board struck a reply declaration as it did not comply with Rule 19.3 (it was neither in response to a new issue which the applicant had no opportunity to address nor did it address issues the applicant could not have reasonably anticipated) – On the merits, the Board accepted the information in the ten declarations by the employer that no employee had asked about K's termination, nor had any employee indicated any understanding or belief that the end of K's employment with the Company was in any way connected to his support for the union organizing campaign – Additionally, the Board noted the timing of a number of events (including K's termination occurring 1 ½ months after the union represented to the employer and the Board that the campaign was dead) did not favour an inference that the employer knew K was a union organizer – The Board found nothing pleaded by the applicants that K's termination had caused irreparable harm or a "chilling effect" on the workplace – Accordingly, the interim application was dismissed

BEFORE: *John D. Lewis*, Vice-Chair.

APPEARANCES: *Elizabeth Mitchell; Carlo Ricci, Joe Furtado* and *Bruce Kozeyah* appearing for the applicant; *Erin Kuzz, Katherine Ford, Jim Pattison* and *Anne Dick* appearing for the responding parties.

DECISION OF THE BOARD: August 9, 2012

1. This is an application for interim relief pursuant to section 98 of the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended (the "Act"). The application for interim relief and an unfair labour practice complaint (the pending ULP application in Board File No. 1283-12-U) were filed by the applicant union, the Labourers International Union of North America, Local 506, (the "Labourers") with the Board on July 24, 2012. The Labourers sought as interim relief the reinstatement of Bruce Kozeyah ("Kozeyah") and initially sought various other remedies by way of interim relief. The responding parties all resist the interim application.

2. By way of background it should be noted that the Labourers on May 28, 2012 had previously filed an application for certification against the named responding parties, Board File No. 0639-12-R. The application for certification sought remedial certification pursuant to section 11 of the Act. A companion application, under section 96 of the Act (Board File No. 0640-12-U) was also filed on May 28, 2012 that alleges the responding parties committed certain unfair labour practices in connection with the Labourers' organizing campaign, including the non-recall/termination of its two key inside organizers.

3. The Board held a Consultation on July 31, 2012. The parties appeared with those persons who had filed declarations in this matter. The Labourers filed two declarations and one supplementary declaration. The responding party employer filed 10 declarations. At the outset of the Consultation the Board indicated to the parties that it would only be referring to the response filed by the responding party employer, James Dick Construction Ltd. (the "Company" or "JDCL"), as both JDCL and Kozeyah had identified this corporate entity as being the employer of the terminated employee. The Board acknowledged that the Labourers had also filed an application under section 69 and/or 1(4) of the Act (Board File No. 0938-12-R), naming all of the responding parties, however, the Board (differently constituted), in a decision dated July 27, 2012 had indicated that the single employer/sale of the business application was to be held in abeyance pending the Board's decision in the two ULP complaints that have now been filed by the Labourers. In *Wedgwood Retirement Resort*, 2012 CanLII 19760 (ON LRB), the Board found that the logical and natural reading of section 98 of the Act demonstrates that the words of the section are to apply to the employees of the employer allegedly violating the Act. As both JDCL and Kozeyah identify JDCL as the employer in this matter, and for reasons of expediency, the Board indicated to the parties that it would only be referring to the response filed by JDCL as it was the acknowledged employer of Kozeyah.

4. At the outset of the Consultation the Board also indicated to the parties that the purpose of the Consultation was to elicit further information to assist the Board in answering the threshold questions outlined in section 98 of the Act. I indicated the Consultation was not for the purpose of making findings of fact whether or not an unfair labour practice had been committed. That function is left to the panel of the Board that will be assigned to the pending ULP proceedings. I also indicated that, based on the declarations and submissions filed, I did not need to hear from the parties on the issues identified in section 98 (2), paragraphs 1 and 2 of the Act. The employer in its materials had conceded that there was a serious issue to be decided in the pending proceeding. Likewise, the employer had conceded that the circumstances giving rise to the pending ULP in Board File No. 1283-12-U occurred at a time when a campaign to establish bargaining rights was underway.

5. The Board also referred the parties to paragraph 42 of the *Metrican Stamping Co. Inc.*, 2005 Can LII 43485 (ON LRB) decision, which described the Consultation process as follows:

> A Consultation is not a traditional Hearing. It is a very flexible procedure that allows the Board to be proactive in exploring the allegations so as to decide the matter expeditiously. Where possible, the goal is to conduct the Consultation in one day. The declarants are not usually required to give testimony under oath and the parties are not normally allowed to engage in questioning or cross-examination of the declarants. The Consultation will not necessarily be used to resolve all disputes regarding all of the facts or to determine the credibility of the declarants. Rather, in the absence of resolving all of the factual disputes or determining the credibility of the declarants, the Board may still be able to conclude that it has sufficient information to render a ruling on the section 98 Application.

6. Therefore, the remaining questions for determination are:

i) Whether the interim relief is necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives?

ii) Whether or not, the balance of harm favours the granting of the interim relief pending the outcome in the unfair labour practice complaint?

iii) Whether or not, it appears that the termination of Kozeyah was unrelated to the exercise of his rights under the Act?

The Labourers' Version of Events

7. Kozeyah has been employed by JDCL for over four years as a concrete ready mix truck driver. He works out of the Alliston ready mix location at Highway 89. He typically works from April to December each year and has been recalled from seasonal layoffs in every year since he commenced his employment with the Company. With the exception of certain locations, his work takes him regularly to a number of the Company's ready mix locations.

8. The Labourers assert that Kozeyah has been a key inside organizer since on or about March 6, 2012, for the union's organizing campaign which commenced March 2, 2012. He was recalled from seasonal layoff on or about April 4, 2012 and he immediately commenced speaking to his fellow employees about the importance of supporting the union and encouraging them to sign membership cards. Between April 4, 2012 and the date of his termination on July 13, 2012, it is alleged that Kozeyah spoke to about 50 of his co-workers. The applicant submits that during this time Kozeyah was in regular contact with the union and provided them with information in order to assist with the organizing drive. It is further asserted that Kozeyah made no secret of his support for the union at work. He wore union T-shirts and other clothing in support of the campaign. He was not afraid to speak in support of the union in front of supervisors.

9. It is the Labourers' position that Kozeyah's supervisor, Jim Pattison, ("Pattison"), the Operations Manager at the Alliston ready mix location, in or about mid-April 2012 approached Kozeyah and asked him if he had been talking to the union. Kozeyah responded "yes", that the union had been to his house and that he knew that union organizers were making house calls to all of the Company's employees. Soon thereafter Pattison delivered a letter, dated April 23, 2012, suspending Kozeyah for three days for not following proper reporting procedures as it concerns work-related safety issues. Kozeyah believed that he had received the suspension because a co-worker had told Pattison that Kozeyah had contacted the WSIB and had filed a complaint against the Company.

10. Subsequent to receiving the three-day suspension Kozeyah made various inquiries and attempts to have his suspension removed. His declaration indicates a Denise Peabody, a quality control tester for the Company, agreed to assist him in getting the suspension lifted. Denise Peabody's declaration, filed in response, denies this. Kozeyah's declaration also indicates that sometime in May 2012, Pattison apologized to Kozeyah and said he was sorry about the whole thing and that the situation was unfair and he would take care of it. Pattison, in his declaration, denies all of these assertions made by Kozeyah. Kozeyah's declaration also states he contacted the WSIB, who he believed would be contacting the Company to discuss this issue with the Company. In or about the first week of July 2012, Kozeyah's declaration states he made inquiries with the Company as to whether his suspension had been removed from his record. Anne Kurmey ("Kurmey"), the person responsible for personnel records at JDCL, indicated to him that it had not been removed and could not be removed without a direction from Pattison to that effect. As a result, on or about July 11, 2012, Kozeyah approached Pattison and asked when the suspension would be removed from his record. Kozeyah's declaration alleges that Pattison responded that Kozeyah should give him a letter stating why the suspension should be lifted. Then Pattison informed Kozeyah that he had received a complaint from Greg, one of the front end loader operators, that Kozeyah had contacted the Labour Board to complain about the Company. Kozeyah responded to Pattison that this was untrue, and in fact, Greg, who was in the yard at the time, confirmed to Pattison that Kozeyah had not complained about Pattison or contacted the Labour Board. At that point, Kozeyah asked Pattison why he was lying and Pattison responded by directing Kozeyah to leave the workplace. It should be noted that these facts are disputed in both the declarations of Pattison and Greg Vottero, filed as part of JDCL's response materials.

11. According to Kozeyah's declaration, he then drove to the Company's head office in Bolton, where he spoke with a Fred O'Leary ("O'Leary"), the supervisor responsible for the batchers and allocation of ready mix trucks. O'Leary telephoned Brian Dykstra ("Dykstra"), who is in upper management, and Kozeyah was informed that a meeting on July 16, 2012 would take place and that a Greg Sweetnam ("Sweetnam"), the person responsible for personnel issues with the Company, would be back from vacation then and would phone to set up a time for the meeting.

12. On July 13, 2012, Pattison telephoned Kozeyah and asked to meet him at the Alliston plant that same day. Kozeyah drove to the yard, at which time, Pattison walked up to him and gave him a letter informing him that he had been terminated and that there would be no meeting on July 16. For ease of reference the contents of the July 13, 2012 termination letter is set out below:

> July 13, 2012
>
> HAND DELIVERED
>
> WITHOUT PREJUDICE
>
> Mr. Bruce Kozeyah
>
> Dear Bruce:
>
> Further to our discussion Wednesday, July 11, 2012, your defensive attitude, anger and increasing outbursts have made your continued employment with James Dick Construction Limited unacceptable. It is a concern for the company to have you operating a large ready mix truck on our highways in an agitated state. This letter will confirm that

your employment has been terminated with cause effective July 11, 2012.

Your final pay will be deposited into your account on Friday, July 20, 2012, and will include outstanding vacation pay. We have enclosed your final pay advice and Record of Employment and encourage you to follow up with EI as soon as possible to find out what your options are.

In addition, we have included an Application for Conversion of Group Life Insurance which gives you the option of continuing life insurance should you choose. We suggest that you send the completed form by registered mail to:

Manulife Financial
PO Box 11006, Stn Centre-Ville
Montreal, QC H3C 4P8

While your Health and Dental Benefits terminate as of July 11, 2012, your Basic Life Insurance continues for 31 days following termination of employment. During this 31 day period you may convert the amount of your Group Life Insurance to any individual whole life or convertible one-year term or term to age 65 plan without submitting evidence of health. Please note that you have 90 days to submit any outstanding health or dental claims.

Sincerely,

Jim Pattison
Operations Manager - Alliston Ready Mix

cc Greg Sweetnam
Anne Kurmey

13. Kozeyah denies that he had an inappropriate attitude, nor did he have any outbursts, nor has he been angry with the Company. He believes that the attitude and outbursts to which the Company refers in the termination letter are the discussions that he has had concerning his unfair treatment related to his support for the union and employees rights. The reference to operating a truck in an "agitated state" is simply nonsense and he denies that he has operated a truck in an agitated state.

The Employer's Version of Events

14. JDCL is an employer that manufactures and delivers ready mix concrete, sand stone and gravel products and engages in secondary activities including trucking, winter works, equipment sales and road construction. It currently employs over 240 employees. Ready mix drivers are responsible for delivering concrete to various customer locations. The ready mix trucks are very large and very heavy, weighing as much as 60 tonnes when full of concrete. As such, it is submitted that the trucks must be driven responsibly as they have the potential to cause serious damage. The responding party's Company name as well as the truck number are visible on each truck. Among the training the ready mix drivers receive is that they are trained to look for and report any hazards in their vehicles as well as any health and safety concerns they may have.

15. By way of background JDCL asserts that on or about early December, 2011, Kozeyah wanted to be laid off early because he had a pre-existing shoulder injury and would soon be going for surgery. It was not Pattison's intention to lay off Kozeyah at that time, but later that same day, Kozeyah claimed to have injured himself while performing work for the Company and he filed a WSIB claim. The Company disputed that Kozeyah had suffered a work-related injury given that it knew he had a long-standing shoulder injury. On or about December 12, 2011 the WSIB informed Kozeyah that his compensation claim had been denied as he had not been injured in the course of his employment with JDCL.

16. Prior to his recall in April of 2012, the Company met with Kozeyah to make sure he had no ongoing medical restrictions and that he was fully cleared to return to work without restrictions. Kozeyah provided the Company with medical documentation that he was fit and able to return to work and perform the full duties of the ready mix driver position. However, JDCL asserts that when Kozeyah commenced work in April of 2012, he immediately and repeatedly complained about the truck he had been assigned. Kozeyah was angry and felt he had been given the oldest truck in the fleet and that the truck was unsafe. It is asserted that Kozeyah told Mary Comerford ("Comerford"), a dispatcher, that he had called the WSIB to complain about the truck because he had a shoulder injury and he should be accommodated. Comerford told Pattison what Kozeyah had told her. Pattison was annoyed that Kozeyah would go directly to the WSIB without following proper internal reporting procedures if he had felt the truck was unsafe. On or about April 13, 2012, Pattison had a meeting with Kozeyah in which Kozeyah denied telling Comerford that he had called the WSIB. Kozeyah said Comerford was lying. Pattison had also found out that Kozeyah had gone to Dane Clark ("Clark"), the Company's health and safety coordinator, the day before. Kozeyah was agitated and had complained to Clark that the truck he had to drive was "a piece of shit", and that the Company should be accommodating him because of his shoulder with a newer truck. Kozeyah never identified anything specific about the older truck, he just kept suggesting that there was something wrong with the existing truck and implying that he would be injured if he continued to drive it. Kozeyah never formally completed any of the required forms to either report a hazard with the truck or to identify specific health and safety concerns with the truck. As a result, Pattison decided to suspend Kozeyah for three days for failing to follow proper procedures. Pattison was annoyed that Kozeyah had gone behind his back to complain about the truck; that he kept suggesting there was something wrong with his existing truck and implying that he would be injured if he drove it; and threatening to call the WSIB on the Company, without completing any of the required forms to report a hazard or health and safety concern.

17. Pattison's declaration denies Kozeyah's version of events and explicitly denies that he ever apologized to him about the suspension or that he would take care of it, nor did he tell him the discipline was unfair and that the suspension would be lifted. He denies that he failed to return phone messages but does confirm that he told Kozeyah that if he was unhappy regarding the three-day suspension Kozeyah should write a letter outlining his concerns and that Pattison would take it back to upper management.

18. Pattison's declaration also provides details of several incidents that occurred on July 10 and 11, 2012. In particular, on July 10, 2012, Pattison recalled an incident when he was setting up the cleaning station for the trucks. In the process of setting up the cleaning station, Kozeyah came over and indicated that he wanted to help. Pattison did not want Kozeyah's assistance as the last time Kozeyah had helped set up Kozeyah had cut his hand and had to go to the doctor for it. As Pattison did not want to get into another situation where potentially Kozeyah could hurt himself and go off work he told Kozeyah that he should finish cleaning his cab and then return to the line. It is asserted that Kozeyah got angry when Pattison told him to go back to the line. Kozeyah stood on his fuel tank and started to wave his arms and yell at Pattison. Pattison did not want to provoke an incident and he could not hear what Kozeyah was

yelling, as Pattison was standing directly by the loader engine that was used for the cleaner and which was very loud. Pattison yelled back to Kozeyah to get back in his truck and Pattison walked away.

19. Dykstra, the Director, New Business, Equipment and Branding was nearby and witnessed this incident. Dykstra's declaration asserts that Kozeyah called Pattison a "fucking asshole" and was yelling at Pattison and waving his arms around. Dykstra went over to Kozeyah and told him this wasn't the way to talk to anyone. Kozeyah then got back in his truck and drove off punching at the gas pedal, which resulted in a roaring noise. Kozeyah then drove to the end of the line of trucks waiting to load up with concrete. Dykstra alleges that he drove over to where Kozeyah was waiting and overheard him talking derogatorily about Pattison to the other drivers. Dykstra again told Kozeyah to stop. In his declaration, Dykstra indicates that at the time he didn't realize that Pattison had not heard the things that Kozeyah had been saying to Pattison, and that if he had known that, he would've gone back and told Pattison at that time.

20. Pattison's declaration, as well as the declaration of other declarants, also provides details of an incident that occurred on July 11, 2012. The various response declarations speak to an incident that occurred on July 11, 2012 in which a member of the public complained to the Company about Kozeyah's driving, in particular, blowing his horn repeatedly and scaring two members of the public. The individual who complained indicated that the driver looked angry and provided the truck number, which matched the truck number that Kozeyah was driving that day. It is alleged that Kozeyah explained to one of the dispatchers that his horn had gotten stuck and denied that he looked angry.

21. After leaving the dispatch office Kozeyah found Pattison and indicated to him that he had scratched his leg that morning on his truck. He rolled up part of his pant leg to show the scratch. He indicated that he had scratched it on the bolt that holds a mud flap. In his declaration, Pattison admits that he dealt with this issue in a flippant way and took a hammer and went over to the truck and knocked the bolt off the truck and told Kozeyah that that should take care of the issue. Pattison asserts he was sick of hearing Kozeyah complain about his truck and viewed this just as another unsubstantiated complaint by Kozeyah to get reassigned to a newer truck.

22. Pattison's declaration alleges that Kozeyah then became very agitated, started yelling and swearing at Pattison, and waving his arms around and indicating he had had it with the Company. Kozeyah started yelling that he felt like his blood pressure was going through the roof and threatened to call Indian Affairs and the Ministry of Labour. Pattison's declaration indicates that he was concerned the episode might escalate into violence and kept telling Kozeyah to calm down. This episode was witnessed by a Greg Vottero ("Vottero"), a loader operator, who denies that he ever told Pattison that Kozeyah had contacted the Labour Board. Rather, Voterro's declaration states that he interjected himself into this episode by stating that he had heard Kozeyah say he was going to call Indian Affairs before if someone said something Kozeyah did not like. Kozeyah then started yelling at Pattison and telling Vottero "this is none of your fucking business".

23. As a result of this incident Pattison told Kozeyah to leave the workplace and go home so he could calm down, that he was not being fired, and that he should come back tomorrow morning. The declaration asserts that Pattison was concerned about Kozeyah's emotional state and did not want him driving a Company truck in his state. Pattison then went to speak to the dispatchers to inform them that he had sent Kozeyah home. That is when Pattison learned about the complaint from the public concerning Kozeyah's driving. Later that afternoon Pattison got a call from O'Leary who told Pattison that Kozeyah had shown up at the Company's head office in Bolton and was very angry and wanted to talk to someone in authority. O'Leary informed Pattison that it had taken thirty minutes to calm Kozeyah

down before he went home. Later that night, Pattison called Kozeyah and indicated he wanted him to stay home until Pattison could set up a meeting with Sweetnam, Manager of Physical Resources, who would be returning from vacation on the following Monday.

24. On July 12, 2012, Pattison learned that Anne Dick, the Office Manager and Corporate Secretary, had returned to the office from vacation. Pattison went to speak to her about the situation with Kozeyah. Kurmey, the Payroll Manager, also sat in on the meeting. Declarations were filed from all of these individuals which assert that the events of July 10 and 11, 2012 were reviewed. Pattison indicated that he was extremely concerned that there was a risk to employees and to members of the public if Kozeyah return to his duties as a ready mix driver. The consensus in that meeting was that Kozeyah, in his emotional state, could not be on the road without being a potential liability to the Company. They were concerned about his recent erratic and explosive behaviour and thought the best way to protect the Company from liability would be to proceed with his termination. As a result, a termination letter was drafted and was given to Kozeyah at a meeting which took place on July 13, 2012.

25. All of the declarations filed on behalf of the employer indicate that at no time prior to the filing of the interim application did Kozeyah (or anyone else) indicate to anyone in management that Kozeyah was either an organizer for or a supporter of the applicant. No member of management had seen him wear "union Tee-shirts and other union clothing" as alleged, nor had any member of management, Pattison or otherwise, ever had the conversations Kozeyah alleges in his declaration with respect to his alleged union support.

Preliminary Issues

26. At the Consultation and in its Response, JDCL raised a number of preliminary issues concerning Kozeyah's declaration, as well as the declaration of Joe Furtado ("Furtado"), a union organizer for the Labourers. JDCL asserted that a number of the statements in these respective declarations lacked the required particulars and should not be relied upon by the Board in these proceedings. It argued that the Board's Rules of Procedure require a party to an application to plead all material facts on which they intend to rely, including the circumstances, what happened, when and where it happened, and the names of any person said to have acted improperly. The responding party submitted that, particularly given the expedited nature of this type of application and the extraordinary relief the applicant was claiming, the applicant must ensure that it fully complies with the Board's Rules of Procedure.

27. In particular, JDCL requested the Board strike various statements made by Kozeyah at paragraphs 4 and 15 of his declaration. For example, at paragraph 4 Kozeyah makes the assertion that "I made no secret of my support for the union at work. I wore union Tee-shirts and other clothing. I was not afraid to speak in support of the union in front of supervisors." The responding party submits that the applicant has made a bald assertion of fact without any supporting particulars. The applicant has failed to state when Kozeyah claims to have worn union Tee-shirts and other clothing in a way that permits the responding party to directly respond. While the responding party entirely denies that anyone in any way connected to the decision to terminate Kozeyah's employment at any time saw him wearing union Tee-shirts or other union clothing, it asserts the applicant should not be permitted to pursue such unparticularized allegations.

28. Likewise, the responding party vehemently denies that it was aware that Kozeyah was a union organizer or supporter. In suggesting that the Kozeyah was not afraid to speak in support of the union in front of supervisors, the applicant has suggested that Kozeyah did, in fact, speak in support of the union in

front of supervisors. However, the applicant has failed in this statement to identify the name of a single supervisor in front of whom Kozeyah allegedly made a pro-union comment, let alone the date, time or location. As such, the responding party is not in a position where it can meaningfully respond to the allegation and such an allegation should be struck.

29. Similarly Kozeyah's paragraph 4 statements that he spoke to about 50 co-workers about the importance of supporting the union and encouraged them to sign membership cards, as well as Kozeyah's paragraph 15 statement, that he continued through this whole time to talk openly to his co-workers at work about the union and encourage them to support the union, are submitted by JDCL as further examples where the applicant has made unparticularized and unsupported statements which should not be relied upon and struck.

30. The responding party also submits that the statement of "since [Mr. Kozeyah's] termination, despite the union's continued efforts to organize the workers, no employees had signed cards", should be struck from Furtado's declaration. JDCL asserts that Furtado has not provided a single material fact to support his assertion that the applicant "continued its efforts to organize the workers". Furtado had not provided a single date, time or location where he claims he or anyone else acting on the union's behalf, has made efforts to speak with a single employee or their response to the union's alleged attempts.

31. Likewise, JDCL asserts the statement, "I believe that Kozeyah's termination has brought a final end to the union's ability to continue to organize. The responding Parties' actions, if not remedied, will irreparably harm employees' ability to freely select a trade union", should also be struck from Furtado's declaration. JDCL submits that Furtado does not provide any factual basis for this belief. Furtado has not identified that a single one of the employees has indicated any concern about signing a membership card, nor has he in any way connected Kozeyah's termination to his alleged support for the applicant. As such, this assertion is without any basis in fact.

32. In addition, JDCL asserts that the supplementary declaration of Elio Toppan ("Toppan"), the Regional Organizing Coordinator for the Labourers, filed the day before the Consultation, did not comply with Rule 19.3 of the Board's Rules of Procedure. JDCL asserts the supplementary declaration should not be entertained by the Board. Rule 19.3 states the following:

> **19.3** Where the responding party has raised a new matter, which the applicant had no opportunity to address or matter which could not reasonably have been anticipated, the applicant may file reply declarations, as described in Rule 19.1(a), within one (1) day of the receipt of the responding party's declarations.

33. JDCL also asserts that the applicant has made statements in its Schedule "B" to the interim application , which are unsupported by any of the statements contained in the declarations properly before the Board. Further, it is asserted that it is far too late for the applicant to make any claim in respect of the April 23, 2012 suspension in the context of this interim application. While neither the Act nor the Rules expressly set out a time limit for the filing of an interim application, the Board has acknowledged that, particularly due to the extraordinary nature of the remedies requested, it expects a trade union to act expeditiously in the filing of such an application if it is to be considered by the Board. In this regard, the responding party submits that the delay of approximately 3 months, as it concerns the three-day suspension, is not only excessive, but is entirely unexplained by the applicant, particularly where the applicant is in the midst of an ongoing campaign and is claiming that Kozeyah is a critical inside organizer. As a result, it is asserted that the applicant cannot now raise any suggestion that the three-day

suspension was improper, both as a result of its extreme delay and because any such suggestion is entirely unsupported by its own declarations.

34. As it concerns the responding party's submission that the declarations lack particulars, the Labourers respond that it would be bad labour relations policy to force a trade union to provide the names of employees, dates, times, locations and other details involving inside union organizers and the conversations they may have had when approaching other employees to garner support of the union.

Legal Analysis

The Preliminary Issues

35. The Board has reviewed the contents of the applicant's reply declaration of Toppan and agrees with the responding party that the issues raised within the declaration are not new issues, nor are they issues the applicant could not have reasonably anticipated. In fact, the Board agrees with the responding party that the content of Toppan's declaration deals with issues the applicant had already commented on in its application materials. By way of example, the applicant in the declaration of Toppan now addresses why it did not take issue with the three-day suspension when it was issued back in April 2012. The declaration signed by Kozeyah already went through the circumstances surrounding the suspension in significant detail. It is also clear that the applicant was aware that the suspension was a relevant fact, but it is only after receiving the responding party's response, that it attempted to address its relevance to the campaign. Further, in the declaration of Toppan, the applicant attempted to incorporate the entire contents of the unfair labour practice complaint filed May 28, 2012, without suggesting that the declarant could confirm the contents from his personal knowledge.

36. In reviewing Toppan's declaration, the Board is of the view that the applicant is attempting to supplement its pleadings. It is attempting to address issues which were squarely relevant, and which the union would have had knowledge of prior to the filing of the interim application, and which it failed to address in its application. The applicant is attempting to fix deficiencies in its original pleadings. The Board finds that Toppan's declaration is not a response to a new matter raised by the responding party in its declarations. To allow an applicant a right of reply, to simply address deficiencies in its pleadings after the responding party has pointed out those deficiencies, is not a proper reply declaration and, therefore, the Board strikes the declaration of Toppan and will not rely on its contents as it does not comply with Rule 19.3 of the Board's Rules of Procedure.

37. The Board also agrees that there are certain statements made by the applicant in its Schedule "B" to its application, which are not supported by any statements contained in the declarations. In particular, Schedule "B", paragraph 44, asserts that "there is also reasonable cause for the employees to believe that the Act has been violated". This statement is entirely unsupported by the contents of the two remaining declarations. In fact, neither of the two (2) remaining declarations filed by the applicant suggest that a single employee of the responding party has drawn any connection between Kozeyah's termination and any exercise of his right under the Act. As such, to suggest an argument that employees have made such a connection is improper and the Board cannot rely on such a statement.

38. As the Board commented on in *MJ Manufacturing - a Division of Martinrea International Inc.*, 2010 CanLII 29725 , at paragraph 18:

> 18. The Board's decision to grant interim reinstatement is a serious one. A reinstatement order means that employer is compelled

> to take an employee back to work when it has already decided not to continue to employ that individual. **The Board's decision is based on declarations, which are generally not tested by cross-examination. The Board's decision must be supported by clear statements in the declarations. [emphasis added]**

39. Likewise, in *Almon Equipment Ltd.*, 2009 CanLII 37621 (ON LRB), at paragraph 5, the Board made the following relevant comment:

> 5. In this case, there are conflicting assertions in the pleadings of the Union and Almon, but many of them are not supported by any statement in a declaration or are supported by a declaration in which the assertion in the declaration does not meet the requirements of Rule 19.2(a). That Rule requires that information be based on first-hand knowledge and that all of the facts be set out. In my view, the term "all the facts" must mean all the necessary facts and the proper particulars of those facts, including the dates of occurrence and the names of the individuals involved. Declarations that contain hearsay evidence or lack particulars in terms of time, date and names of individuals involved do not conform to the requirements of Rule 19.2(a).

40. Given the above excerpts from the *Almon Equipment Ltd.* and *MJ Manufacturing* decisions, *supra*, the Board also finds that Schedule "B", paragraph 48 contains an assertion that is not supported by any of the declarations filed by the applicant. In particular, paragraph 48 asserts "the employees at the Company's ready mix plants at Alliston, Bolton, Brampton, Caledon and Scarborough-all of whom Mr. Kozeyah comes into regular contact are acutely aware that he, like two employees before him, was fired because of his support for the union". In reviewing the declarations filed by the applicant, neither Kozeyah nor Furtado make any statements touching upon the awareness of other employees in the sought after bargaining unit. Therefore, the Board cannot rely upon such an unsupported assertion.

41. Likewise, Schedule "B", paragraph 47 of the application, which asserts that "the fact is that the Company suspended and later terminated Mr. Kozeyah's employment because he campaigned in support of the union's drive to unionize the Responding Parties and the Responding Parties want to kill the effort to unionize", is also unsupported by the two declarations filed by the applicant. Nowhere in either of the two declarations of Kozeyah or Furtado is it suggested that the three-day suspension is in any way related to an exercise of his rights under the Act. The Board finds Kozeyah's declaration clearly establishes he believes the suspension was related to an alleged complaint he filed with the WSIB. Furtado's declaration does not even mention anything about the three-day suspension. Having filed no declarations suggesting that the three-day suspension was connected to an exercise of his rights under the Act, the Board will not allow the applicant to assert such a connection in its legal argument. Further, the Board is of the view that it is also too late for the applicant to make any claim in respect of the April 23, 2012 suspension in the context of this interim application. In this case, the delay of approximately 3 months is significant and is not adequately explained by the applicant in its declarations from Furtado and Kozeyah. The Board notes that the applicant brought its first unfair labour practice complaint on May 28, 2012 concerning the failure to recall/termination of its two (2) key inside organizers, Christian Miller and Barry Thrasher. If the three-day suspension, to another of its key inside organizers, namely Kozeyah, was tainted with anti-union animus, one would think that the union would have included that allegation in its first unfair labour practice complaint as an additional ground on which to argue for remedial certification.

42. The Board also agrees with the responding party that a number of the statements made in the declarations of Kozeyah and Furtado, as set out in paragraphs 26 – 31 of this decision are deficient.

Many of the statements are nothing more than bald allegations lacking particulars and lacking corroboration in any other declaration. For example, Kozeyah claims that he was in regular contact with the union and provided them with information in order to assist in the organizing drive, yet the declaration of Furtado, the organizer for the Labourers, gives no particulars whatsoever as to the role Kozeyah played in the Union's organizing campaign. Therefore, the Board has given the unparticularized statements in the applicant's declarations, little or no weight. The Board's Rules of Procedure require a party to an application to plead all material facts on which they intend to rely, including the circumstances, what happened, when and where it happened, and the names of any person said to have acted improperly. Given the expedited nature of this type of application and the extraordinary relief the applicant is claiming, the applicant must ensure that it fully complies with the Board's Rules of Procedure.

Legal Analysis – The Merits

43. Section 98(4) of the Act expressly states that despite section 96(5), the onus of proof for the purposes of an application under section 98 for interim relief lies upon the applicant union. In addition, it is clear from a reading of subsection 98(2) that all the conditions contained in the provision must be met and also satisfy the test set out in subsection 98(3) in order for the Board to be in a position to grant substantive interim relief (see *Upper Gage Price Chopper*, 2009 CanLII 39216 (ON LRB), at paragraph 33). Therefore, the Board will first deal with the issue as to whether the applicant has satisfied its onus in establishing that interim relief is necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives.

Is Interim Relief Necessary to Prevent Irreprable Harm or is Necessary To Achieve Other Significant Labour Relations Objectives?

The Position of the Union

44. The Labourers assert the declarations of Kozeyah and Furtado establish that Kozeyah was an active and well-known key inside supporter and organizer for the union. Since his termination, the union's campaign has finally ground to a halt, as not one card has been signed after the date of his termination. His termination sends a message to all of the employees that support for the union will result in termination or other harsh treatment. As such, the responding party's actions, if not remedied, will irreparably harm the employees' ability to freely select the trade union.

45. The union asserts that the Board has held that the termination of a union supporter because of his support for the union gives rise to irreparable harm for the purposes of section 98(2), paragraph 3 of the Act (see *Patrolman Security Services Inc.*, 2005, CanLII 38038 (ON LRB); *Clayson Steel (1988) Inc.*, [2007] OLRD No. 207; *Dovercorp. Enterprises Inc.* [2007] OLRD No. 2814). The Labourers argue that there is and will be a dramatic chilling effect on others, who will be wary of exercising their own rights under the Act, given the example the responding party has set with Kozeyah. This adverse impact will only be compounded with the passage of time. Without an interim remedy reinstating Kozeyah, the union's organizing efforts with the responding party will be severely and negatively impacted.

46. The Labourers submit that the declarations of Kozeyah and Furtado establish that the employer knew Kozeyah was an active union supporter. In any event, it asserts that irreparable harm is not necessarily dependent on the employer's knowledge of the employee's role or support in the union's organizing campaign. It is submitted the declaration of Furtado establishes if the employer's actions in terminating Kozeyah are not remedied the union's campaign to establish bargaining rights will be irreparably harmed. The outcome of the application for certification has yet to be determined, and it is

essential for the union to continue to build and maintain support for its organizing campaign. As the union's chief source of information has now been removed from the workplace it will send a message to the employees that the employer can fire employees who speak out in support of the union. Correcting this perception is submitted as a significant labour relations objective.

The Employer's Position

47. The responding party disputes that the applicant has demonstrated that it will suffer irreparable harm if Kozeyah is not reinstated. It asserts that while Kozeyah claims to have spoken to "about 50 co-workers", the applicant has not particularized how Kozeyah was a key inside organizer. The applicant does not claim that Kozeyah even obtained a single signed membership card from any co-worker. Based on the reasons advanced in its preliminary objections, the responding party submits the applicant cannot be permitted to rely on the unparticularized allegations of Kozeyah's organizing activities.

48. Further, the responding party submits that the applicant's declarations do not in any way suggest that any individual has made any connection between Kozeyah's termination and his alleged support for the applicant. Nowhere has the applicant suggested that a specific individual has declined to speak to the applicant or sign a membership card, following Kozeyah's termination. Nor has the applicant said any individual has declined to speak to the union or sign a membership card as a result of a perception that Kozeyah's termination was linked to supporting the applicant.

49. In contrast, all ten (10) of the declarations filed by JDCL, in support of its response, indicate that no employee has asked, in any manner whatsoever, any individual declarant about the end of Kozeyah's employment with the Company or the reasons for it. Likewise, no employee has indicated any understanding or belief to any of the ten (10) declarants that the end of Kozeyah's employment with the Company was in any way connected to the union organizing campaign.

50. The responding party cited the Board's decision in *Upper Gage Price Chopper, supra,* a decision in which the Board, despite the termination of the sole inside organizer for the union in that case, went on to find that there had not been a dramatic stall in the union's organizing campaign as a result of the termination and, therefore, there was no irreparable harm to that campaign.

51. The responding party submits that the applicant has fallen far short of pleading sufficient material facts to suggest that there has been any stall in its campaign (dramatic or otherwise) that could possibly be attributed to Kozeyah's termination. In fact, the responding party relied on the union's own pleadings in Board File No. 0640-12-U, which had been incorporated as an attachment to the declaration of Furtado, to argue the opposite. In Board File No. 0640-12-U, the applicant asserted that its failure to collect sufficient membership evidence was as a result of the responding party having failed to recall its lead inside organizer, Christian Miller and its key inside organizer, Barry Thrasher back to employment following the winter layoff of 2011/12. The applicant asserted that in failing to recall Miller and Thrasher to their employment, in effect, the Company terminated them in order to bring a halt to the union's organizing drive. The responding party points to the following paragraphs of the pleadings filed by the applicant in Board File No. 0640-12-U:

> 3(xxiii) Local 506's organizing campaign quickly ground to a halt after word got out that James Dick was aware of the campaign and was threatening to discipline or terminate employees if they had any contact with Christian Miller. Employees were too frightened to sign membership cards. The termination/refusal to recall Mr. Thrasher and

> Mr. Miller to work in April - as the company has in every previous year - put the final nails in the coffin of Local 506's organizing campaign.
>
> 3(xxv) Nothing has a more negative and chilling effect on an organizing campaign than the sudden termination of key union supporters in the workplace such as Christian Miller and Barry Thrasher, and the threats to employees' jobs that have been made by the company if they communicate in any way with Mr. Miller. This company's workplace is no exception.
>
> 3(xxvi) The Union has filed an application for certification this date as bargaining agent for employees of the Responding Party. The other employees, almost all of whom Mr. Thrasher and Mr. Miller come into regular contact in their daily work routine, are acutely aware that the two employees have been fired because of their support for the union. Moreover, the union has lost its key sources of information and key contacts in the workplace because of their termination. As a result, it has been impossible for the union to demonstrate that 40% or more of the individuals in the bargaining unit proposed in the application for certification appeared to be members of the union.

52. The responding party submits that while it vehemently denies the allegations against it in Board File No. 0640-12-U, the fact remains that the applicant's own assertion is that it was the failure to recall Thrasher and Miller, which "put the final nails in the coffin of its organizing campaign" not the alleged improper termination of Kozeyah, which happened more than two months later.

53. While Furtado's declaration states that "since Kozeyah's termination, no employees have signed union cards", nowhere does the declaration suggest that a single card was signed between the filing of its application in Board File No. 0640-12-U and Kozeyah's termination. As such, the responding party submits that the applicant has failed to plead any material facts to support any assertion that, prior to Kozeyah's termination, its campaign had any momentum that was brought to a halt by Kozeyah's termination.

54. As it concerns the union's position that Kozeyah's reinstatement is necessary to achieve other significant labour relations objectives, the responding party states that nowhere has the applicant suggested that a single employee of the responding party has made any connection between Kozeyah's termination and his support for the applicant, nor has any employee declined to sign a membership card on that basis. It is asserted that there is nothing pleaded upon which the applicant can rely to assert that Kozeyah's termination has caused a "chilling effect" on the workplace. As such, there is no need to reinstate him in order to assure other employees of the protection of their statutory rights.

The Decision

55. In *K2 Electrical Contracting Ltd.*, 2006 CanLII 21250 (ON LRB), the Board dealt with an application for interim relief under section 98 of the Act that involved the termination of an individual named Cardno, who agreed to assist the IBEW in attempting to organize the K2 employees. At paragraph 30 of the decision the Board made the following comment concerning what the Board must consider with respect to section 98(2), paragraphs 3 and 4 of the Act:

> 30. With respect to section 98(2) 3. and 4., the Board must consider what the current circumstances of the parties are and what the

> likely outcomes will be if reinstatement is or is not ordered. In my view, for the purposes of the interim application, **the determination of each party's circumstances is to be made primarily on the declarations filed by that party, as supplemented through information attained by the Board at the consultation, and through the application of the Board's experience**, in particular with respect to the prediction as to the likely future outcomes. This appears to me to be the nature of the exercise which the Board undertook in *Patrolman*. [emphasis added]

56. In determining what were the circumstances of the IBEW in the *K2 Electrical Contracting Ltd.* decision, *supra*, the Board noted that the IBEW asserted that employees "have become aware" that the suspension or layoff was related to Cardno's union affiliation and that Cardno's termination "is understood" by employees to be related to Cardno's union affiliation. The Board commented that the use of the passive voice in the declaration provided no information as to the basis of these beliefs and counsel for IBEW provided no further information upon questioning by the Board during the consultation. At paragraph 35 - 37 the Board made the following comments:

> 35. The termination of a single union member and supporter in and of itself undoubtedly harms a union organizing drive, since it represents the loss of a card and a ballot in any representation vote ordered by the Board. However this harm is not irreparable: if an application for certification is made, the union may assert that the card be counted and that the individual is entitled to cast a ballot based on the pending unfair labour practices application. Any dispute by the employer as to whether the individual's card may be counted or the eligibility of the individual to vote may be resolved following the representation vote if necessary. Indeed, this is the procedure the Board routinely follows. **The harm to a union may, however, be irreparable if other employees are dissuaded from supporting the union because they fear they will face similar repercussions from the employer if they do.**
>
> 36. Counsel for IBEW argues that the critical fact is that the other K2 employees believe that Cardno was suspended or laid-off and ultimately terminated because he was an IBEW member and supporter. He argues that the irreparable harm to the union arises from this belief in and of itself. Thus, he argues, it is not critical for the union to establish the chain of information which results in employees having this belief. Indeed, he argues it does not even matter if the beliefs are well-founded, in the sense of being correct. **What matters is the fact that employees have this belief and have communicated it to the union.** He invites the Board to draw upon its own experience and draw the inference that this will have a negative impact upon the union's organizing drive, which will be irreparable unless interim reinstatement is granted.
>
> 37. In my view, both the source of the information and the degree to which it appears to be well-founded are relevant in assessing the degree of harm that a union will experience and whether, in any event, the Board should exercise its discretion to grant interim relief under section 98. Employees can reasonably be expected to give less weight to beliefs based on idle speculation than to beliefs which have some

> foundation. Equally, the weight employees place on a belief may be expected to depend in part on the source of the information upon which it is based. **I have, therefore, serious concerns about the adequacy of the IBEW's material in establishing irreparable harm on the basis of chill to other employees of K2. On the view I take of this matter, however, I need not determine that issue.** [emphasis added]

57. The view that the Board took in the K2 matter, that made it unnecessary for it to decide further with regards to the adequacy of the IBEW declarations concerning irreparable harm, was the Board's finding that pursuant to section 98(3) of the Act, K2's actions were unrelated to the exercise by Cardno of rights under the Act and, thus it dismissed the application for interim relief.

58. The Board agrees with the above comments made in *K2 Electrical Contracting Ltd., supra*, decision. In the present matter, the Board must consider what are the current circumstances of the parties and what are the likely outcomes if reinstatement is or is not ordered. I agree that the determination of each party's circumstances is to be made primarily on the declarations filed by that party, as may be supplemented by the parties at the Consultation and through the application of the Board's experience.

59. Unlike the situation in *K2 Electrical Contracting Ltd., supra*, where there were at least some statements in the declaration of LeBlanc, a foreman, that spoke to the belief and effect Cardno's termination had on the other employees at K2, the two (2) declarations in this matter of Kozeyah and Furtado do not assert that any other employee has made any connection between Kozeyah's termination and his alleged support for the applicant. Nowhere is it suggested that a specific individual has declined to speak to the union or sign a membership card following Kozeyah's termination. Further, nowhere is it suggested that an individual has declined to speak to the union or sign a membership card as a result of the perception that Kozeyah's termination was linked to supporting the applicant. While Furtado's declaration states that no employees have signed union cards since Kozeyah's termination, nowhere does he suggest that a single card was signed between the filing of its remedial certification application and the ULP complaint in Board File No. 0640-12-U and Kozeyah's termination. These circumstances are completely lacking in the present interim application and, as such, these circumstances distinguished this case from those cases relied upon by the applicant in its legal argument.

60. From the declaration of Furtado, the Board is also aware of the following circumstances. As of May 28, 2012, the Labourers were representing to the Board that due to the terminations of Christian Miller and Barry Thrasher, the union had lost its key sources of information and key contacts in the workplace and that other employees were acutely aware that these two employees had been fired because of their support for the union and as a result of that chilling effect, the final nails had been driven into the coffin of its organizing drive leaving the union no option but to seek remedial certification pursuant to section 11 of the Act.

61. On the other hand, the circumstances established by the responding party's declarations are that the employer was not aware that Kozeyah was a union supporter/organizer. The Board does not agree with the Labourers' position, advanced in legal argument, that just because an employee seeks the assistance of outside third parties, such as the WSIB, Indian Affairs, or even the Ministry of Labour, the Board should infer JDCL had formed the opinion that Kozeyah was a union supporter or inside organizer. The Board also does not agree, even assuming without finding that Kozeyah's statement that he told Pattison that the union had been to his house and that he knew the union organizers were making house calls to all of the company's employees (a conversation that is denied by Pattison), this demonstrates the employer had knowledge that Kozeyah was a union supporter. This fact is neutral at best, and is equally consistent with the characterization of a "loyal" employee passing on information to an employer during

an organizing campaign. Likewise, the Board is not willing to impute the employer with anti-union animus and knowledge that Kozeyah was a union supporter/organizer, based on the wholly unparticularized and uncorroborated statements of wearing union Tee-shirts and clothing; speaking to about 50 co-workers about the union and encouraging them to support the union; and not being afraid to speak in support of the union in front of supervisors. In this regard, the Board notes the declaration of Denise Peavoy, a quality control representative, which declaration has not been disputed by Kozeyah, stating that she had a conversation with Kozeyah about the union in June of 2012. In this conversation, Kozeyah indicated to her that he didn't agree with the union and that he didn't think it was necessary to have a union. He told her he was having nothing to do with anything about the union.

62. In any event, the Board's jurisprudence establishes irreparable harm is not necessarily dependent on the employer's knowledge of the employee's role or support, rather, the critical fact is what the other employees believe and how they have acted in light of the action taken against the employee. In this regard, the circumstances put forward in all ten (10) of the declarations file by JDCL state no employee has asked in any manner whatsoever about Kozeyah's termination, nor has any employee indicated any understanding or belief that the end of Kozeyah's employment with the Company was in any way connected to his support for or in any way connected to the union organizing campaign.

63. Other circumstances established by the various declarations is that a three-day suspension was on record. It was given to Kozeyah on April 23, 2012, before the union filed its application for certification seeking remedial relief and brought its ULP in Board File No. 0640-12-U. Almost 3 months after the suspension, the union, for the first time, is now asserting the employer's discipline was tainted with anti-union animus. Further, the termination of Kozeyah occurs approximately 1 1/2 months after the remedial certification and first ULP are filed, in which the union represents to the Board and the employer that its campaign is dead. The termination also takes place almost immediately after the incidents of July 10 and 11, 2012, one of which involves a complaint from the public. The above timing, based on the Board's experience, does not easily lend itself to an inference that the employer knew Kozeyah was a union supporter/organizer and embarked upon building an unjustified disciplinary case to eventually justify Kozeyah's termination.

64. The Board is of the view that there is nothing pleaded in the declarations of Kozeyah and Furtado upon which the applicant can rely to assert that Kozeyah's termination has caused irreparable harm or has caused a "chilling effect" on the workplace, such that there is a need to reinstate him so as to ensure other employees of JDCL of the protection of their statutory rights. The Board agrees with the responding party that the declaration of Kozeyah contains a number of bald assertions as to his union support, which lack any supporting particulars. Kozeyah's declaration also contains gaps in information. For example, the incident of July 10, 2012 is not referred to at all in Kozeyah's declaration, nor did Kozeyah file any supplementary reply declaration disputing any of the material facts relied upon by the responding party in the ten (10) declarations it filed in support of its response. While the applicant also argued there were gaps in the Company's declarations, the Board views those gaps as pertaining to the section 98(3) issue and are not relevant for purposes of the Board's analysis of the 98(2), paragraph 3 issue.

65. Given the above circumstances, and applying the Boards' experience in these matters, the Board is of the view that this is not a case where the union has met its onus and has demonstrated through the declarations filed that it will suffer irreparable harm or that in turn, relief is necessary to achieve other significant labour relations objectives if Kozeyah is not reinstated.

66. As the union has not satisfied the Board with respect to paragraph 3 of subsection 98(2) of the Act, it follows that, even if the applicant had established the conditions outlined in paragraph 4 of subsection 98(2), (i.e. balance of harm) and satisfied the Board as to the test set out in subsection 98(3), the application must still fail. It is clear from a reading of subsection 98(2) that all the conditions contained in the provision must be met in order for the Board to be in a position to grant substantive interim relief. It is therefore not necessary to make any determination about paragraph 4 of subsection 98(2) or about the application of subsection 98(3) (see *Upper Gage Price Chopper, supra* at paragraph 33).

67. The interim application is dismissed.

0778-12-FC Labourers' International Union of North America, Local 1059, Applicant v. **Kleenway Building Maintenance Services Inc.**, Responding Party.

Collective Agreement – First Contract Arbitration – Following a direction from the Board for the settlement of a first collective agreement by arbitration, the parties returned to the Board to have their differences adjudicated – The only outstanding issues for resolution were wage rates and the number of hours required to qualify for benefits coverage –The Board accepted the union's submissions that the Board's role was to effect an agreement that was "fair and reasonable" and would be "comparable to others in the same industry and geographic area," applying an objective standard – The employer, having terminated a contract with a predecessor cleaner company, attempted to introduce reduced wage rates and a higher threshold (minimum hours) of eligibility for benefits coverage – The Board specifically rejected the employer's argument that "ability to pay" should be a consideration – The Board found that the union's proposals reflected the terms of the collective agreement with the predecessor cleaner company when the contract was terminated – Those terms could hardly be described as "breakthrough" – Collective agreement ordered

BEFORE: *Maurice A. Green*, Vice-Chair.

APPEARANCES: *Lorne Richmond*, appearing as counsel, and *M. McFadden* and *I. Nowicki* appearing on behalf of the applicant; *Bill Germanis* and *George Kaplanis* appearing on behalf of the responding party.

DECISION OF THE BOARD: July 23, 2012

1. This is an arbitration pursuant to Section 43(4) of the *Labour Relations Act, 1995*, S.O. c.1, as amended (the "Act"), following a Section 43 application filed by the Union on June 7th, 2012. In accordance with the terms of the Minutes of Settlement reached between the parties on June 22, 2012, (Tab 1, Union's Book of Documents), the Board directed the settlement of a first collective agreement by arbitration, and having noted the parties agreement that the Board arbitrate their outstanding differences, commenced this arbitration pursuant to subsection 43(4).

2. The background to the arbitration shows that the Union represents, *inter alia*, cleaning and building services employees in the London area. Kleenway is a company providing cleaning and building

services in and around the London area. The contract for cleaning and building services at the London and Middlesex Housing Corporation ("LMC"), had previously been held by a different company, Double M & M. Local 1059 also held the bargaining rights for all employees of Double M & M, in the City of London.

3. LMC terminated its contract with Double M & M, and entered into a three year contract for building services with Kleenway, effective January 1st, 2012. On January 3rd, 2012, Local 1059 applied for certification of Kleenway's employees. A representation vote took place on January 10, 2012, at which time the employees voted in favour of being represented by the Union. On January 23, 2012, the Union was certified as the exclusive bargaining agent for the following bargaining unit:

> all employees of the [Employer] in the City of London, save and except supervisors, persons above the rank of supervisor, and save and except office, clerical and sales employees.

4. Notice to bargain was served on the Company, by Local 1059, on February 16th, 2012. The parties subsequently met and attempted to bargain. The Union applied to the Ministry of Labour for conciliation services on April 18th, 2012. Conciliation occurred on May 14th, 2012, but to no avail. The Union requested a "no board report", which was issued on May 18th, 2012. Further attempts were made to bargain culminating in the Union's Section 43 application on June 7th, 2012.

5. At the commencement of the hearing the parties were able to narrow their differences so that the only remaining matter to be arbitrated by the Board was that of the wage rates for the employees, over the agreed upon three year term of the proposed collective agreement, and the number of hours required to work before employees would qualify for benefits coverage. The Company representative confirmed that the draft collective agreement found at Tab 13, of the Union's Section 43 application, represented what the parties have agreed to except for the following provisions. Namely, Article 9.05, as worded, provides for vacation pay to be paid "on or after July 1st of each calendar year…" However, the Company advised, at the hearing, that its practice is to pay vacation pay as part of the regular payment of wages throughout the year. The Union agreed to accept the company's practice. Since the parties are *ad idem* on this matter, it is left to the parties to amend those portions of Article 9.05 to mirror their agreement. If no agreement can be reached, I remain seized of the issue.

6. The next outstanding issue relates to Article 10.01 – Welfare. The Union proposed that "Employees working twenty (20) or more hours per week shall have benefits deductions from their gross pay on or before the fifteenth (15th) day of each month as follows:….". The Company maintains that access to benefits should only commence after employees have worked thirty-five (35) or more hours per week. To be clear, the actual proposed rates that the company pays for the benefits are agreed upon.

7. The final matter, which the Board has to arbitrate, are the wage rates as set out in Appendix "A" – Article 1 – Wages and Classifications", found at page 16 (of Tab 13), of the Union's Section 43 Application. There is only one classification listed. Namely, that of "Janitor/Cleaner". Further, the Company confirmed at the hearing that it has agreed to the "Premiums" of $0.50 cents to be paid those working night shift, and to lead hands.

8. To place the wage issue in context the parties have agreed to a three (3) year term for the collective agreement, the "duration" clauses being found in Article 26, with the term running from January 1st, 2012, until December 31st, 2015. Thus, the parties have agreed that the Board is not limited by the provisions of Section 43(19) in setting the wage rates for the three year period. Finally, Kleenway

confirmed that it was not now proposing both a "full-time" rate, and a "part-time" rate. Its proposal was now for full-time rates only, as is the proposal of the Union.

Submissions of Local 1059

9. The Union provided an overview of the Board's jurisprudence when it arbitrates the settlement of a first collective agreement under Section 43 of the Act. In an oft quoted guiding principle Local 1059 submits that the Board "attempts to achieve the collective agreement terms and provisions that the parties would had achieved, had the process of collective bargaining between the parties been successful". The Union then cited *Canada Building Materials Company*, 1990 CanLII 5701 (ON LRB), where the Board described it's role as follows (at para 13):

> "The object of arbitrating the first collective agreement after a direction has been issued by the Board is therefore to put terms and conditions in that first collective agreement as the employer and trade union would have achieved had the process of collective bargaining not broken down. What collective agreement terms could reasonably be expected to have resulted if the parties' negotiations had not broken down? In answering that question we must assume that the parties would not have negotiated a collective agreement that was not "fair and reasonable" (although we recognize that the parties' definition of that term may differ)." (Emphasis added).

10. Counsel for Local 1059 also cited the *Canada Building Materials Company* case for the proposition that:

> "In determining what collective agreement could reasonably be expected, if the parties' negotiations had not broken down, we can assume that these parties would have made an agreement comparable to others in the same industry and geographic area."
>
> *Canada Building Materials Company, supra*, para 18 (Emphasis added)

11. The Union also relies upon the principle enunciated by Arbitrator Kevin Burkett, who wrote in *Brick Warehouse Corp*, 1994, 43 L.A.C. (4th), at p.443 that:

> "Although first agreements ought not to be 'breakthrough' agreements, they also ought not to be substandard relative to the industry in which the business finds itself". (Emphasis added)

12. Counsel for the Union emphasized that Arbitrator Burkett went on to write (at p.448) that the award was primarily based on collective agreements negotiated in the industry:

> "In fashioning our award..... we have been governed in large measure by the collective agreements that have been negotiated in the industry. This is a first collective agreement and, therefore, in keeping with our view of the appropriate criteria in first contract arbitration, we have, for the most part, remained within the parameters established by these collective agreements."

13. Finally, the Union relied upon then Chair Kevin Whitaker's observations in *Dynasty Furniture Manufacturing Ltd,* 2004 CanLII 2355 (ON LRB) that, in addition to supporting the principles already cited above,

> "... the Board should apply what might be understood as 'objective' standards, rather than what might be 'just, fair and reasonable' in some abstract sense."

14. It should be noted, in passing, that Kleenway's representative did not take issue with the jurisprudence cited by counsel for the Union.

15. Prior to reviewing the Union's evidence of comparable agreements mention should be made of the Union's submission that for the most part the employees who were organized by Local 1059, resulting in its certification dated January 23rd, 2012, were substantially the same employees who had been working for Double M & M, and who had been covered by a collective agreement between Double M & M and Local 1059. The wage rate being paid those employees from June 1st, 2011 to December 31st, 2011 was eleven dollars and twenty-five cents ($11.25) per hour. If Double M & M had held the contract the Union submits that a higher rate would have likely been negotiated, effective June 2012. However, when Kleenway took over the contract and hired those employees, they were hired at ten dollars and fifty cents ($10.50) per hour.

16. Given the comparators cited below, the Union submits that it can hardly be viewed as "fair and reasonable" (presumably from an objective viewpoint) to assume that the parties would have agreed, had they negotiated to a conclusion, upon rates that were less than those which most of the employees had experienced when employed at Double M & M. It was not in dispute that such employees had been protected by collective agreements with Double M & M since approximately 1996. Counsel submitted that the former Double M & M collective agreement should be a key factor in the Board's decision, as it is the best indicator of what collective agreement terms could reasonably have been expected to have been reached, had negotiations not broken down.

17. The Union provided the following chart of cleaning companies, who are active in the City of London, as the comparisons that should be relied upon in setting the rates. At the top of the chart, for ease of comparison, is found the respective proposals of the Union and Company for the three year period in issue.

	Jan 1/09	**Jan 1/10**	**Jan 1/11**	**Jan 1/12**	**Jan 1/13**	**Jan 1/14**	
Kleenway proposal				10.50	10.75	11.00	
Local 1059 proposal					11.25	11.75	12.25
Bee Clean		12.90 (Dec 1)	13.60 (Dec 1)				
Commercial Cleaning Services				(July 1)	12.85 (July 1)	13.00 (July 1)	13.15
Domclean							

Ltd. - light duty/ heavy duty	11.90 (July 1)	10.90 12.20 (July 1)	11.20 12.50 (July 1)	11.50		
Grete Services - light duty/ heavy duty			12.30 (Dec 1)	11.30 12.60 (Dec 1)	11.60 12.95 (Dec 1)	11.95
Grimebusters		(June 1)	12.45 (June 1)	12.75 (June 1)	13.05	
Kora Commercial Services	12.15	12.65 (June 1)	13.15 (June 1)	13.65 (June 1)	(June 1)	
Omni Facility Services		(Dec 1)	11.05 (Dec 1)	11.30 (Dec 1)	11.55	
Sodexho					15.01 (May 1)	15.31 (May 1)

18. Local 1059 argued that the chart clearly shows that, as of 2011, all of the comparable collective agreements contained an hourly wage rate for all employees, of at least eleven dollars and twenty-five cents ($11.25). In fact, it was emphasized, that most of the comparable agreements provided for significantly higher rates than $11.25.

19. As regards what number of hours should have to be worked in order to qualify for benefit coverage, pursuant to Article 10, counsel argued that with the employees facing a cut in weekly hours (from approximately 40 to 20, see para 22 below), in addition to facing a wage cut, it was only reasonable that those working 20 hours, or more, per week be able to access benefits. Further, under the Double M & M collective agreement an employee had to work 37 hours before benefits coverage commenced.

Submissions of Kleenway

20. Kleenway submitted that the rates it was offering, namely, $10.50 for 2012; $10.75 for 2013, and $11.00 for 2014, was all it could afford, as it had based its budget for the bid for LMC on an hourly rate of $10.50, with anticipated increases of 0.25 cents per year, over the three years. Kleenway agreed that it was aware of the terms of the Double M & M collective agreement, including the rates of pay, at the time it prepared its budget and bid document.

21. Kleenway advised, in its written submission, that in the bid process it was informed that Double M & M was a "unionized party", and not the sites of LMC, thus it believed that there was no "reason to assume that the Union would have any involvement" if the contract were awarded to another (itself) vendor. Additionally, the Company submitted that other cleaning companies could afford to pay the higher rates, as those companies were able to control how many hours employees worked. In contrast, the contract with LMC provided that Kleenway would provide a set number of hours of cleaning to LMC's various sites for the contract price. The number of monthly hours to be provided by Kleenway was set at approximately 1549. Although not clearly enunciated, Kleenway was effectively arguing that

other companies could pay higher rates by providing fewer hours of cleaning time, and thus reduce their overhead costs.

22. The Company also advised that Double M & M was able to provide, on average, up to forty (40) hours of work per week, for each employee, as it had cleaning contracts with sites other than those owned by LMC, resulting in it being able to pay the higher rate seen in its collective agreement. Kleenway advised that under the LMC contract it could only provide employees with an average of twenty (20) hours of work per week, given the basis of its budgeting, and the number of hours of work required by LMC. Although Kleenway agreed that it had three (3) other cleaning contracts in the London area, they were non-union, and the Company had a full complement of employees and could not easily utilize Local 1059 members on those contracts. As regards Article 10.01 – Welfare, Kleenway proposed thirty-five (35) hours be worked before an employee qualified for benefits coverage.

23. In conclusion, Kleenway submitted that if it could meet the Union's demands it would, but that the economics, and terms, of the LMC contract did not permit it. Kleenway advised that even on its offer, its profit margin would go from ten (10%) to five (5%) in the third year.

Local 1059's Reply

24. In reply, Local 1059 submitted that as the union, it has no control over the customers with whom Kleenway does business. It was suggested that Kleenway could attempt to increase the number of hours of cleaning work at its other sites, and thus increase its overall profit margins. In any event, so counsel argued, it is for the Company to make its business and economic decisions before entering into business contracts.

Award and Rationale

25. The first aspect to consider is what principles should be applied to the task of choosing the appropriate wage rates. Since Kleenway took no issue with the state of the case law as described by counsel for Local 1059, and as set out in paragraphs 9 – 13 above, the Board sees no rationale, or principled reason, to deviate from the accepted jurisprudence. In fact, as is seen below, when addressing the Company's submissions, and its rationale for its offer, there truly is no other approach that can be, or should be, adopted in "First Contract" arbitration cases.

26. The essence of Kleenway's position is that having made the economic decisions it did, it simply cannot afford the Union's proposal. Thus, it is effectively asking this Board to incorporate into its decision-making an "ability to pay" criterion in order to arrive at what the wage rates should be.

27. The Board rejects such an approach. Firstly, if the Legislature had intended that the Board, sitting as an "Interest Arbitrator" take into account, or apply, an "ability to pay" criterion, it could/would have so stated in Section 43 of the Act. In contrast, the Legislature has spoken and incorporated such a criterion in the *Hospital Labour Disputes Arbitration Act,* ("HLDAA"). Thus, on that basis alone it is not appropriate to broaden (or narrow, depending upon one's perspective) the legal structure provided by Section 43 of the Act.

28. Secondly, it would be potentially harmful if the Board were to adopt such a criterion, when Section 43 applications provide the choice to the parties to have their interest dispute settled by a private arbitrator/arbitration board, as opposed to the Board. Thus, one could end up with an "ability to pay" criterion being adopted by the Board, but not necessarily by the private arbitrators/arbitration boards.

Such a result would do little to maintain the present relative stability in the labour relations community when addressing first contract problems.

29. Thirdly, the "ability to pay" argument is generally far easier to address when dealing with funding emanating from a level of government which supports an institutional employer. However, when faced with employers (entrepreneurs) functioning in the "free market place", how is the Board to go about analyzing the business plans, budgets, and hoped for profit lines, created by the individual employer? To open that "door" is to create an impossible task for which no principled approach exists, and which would, understandably, be seen, as an unjustified incursion into a company's private business affairs on the Board's part. Thus, the Board is left to implement the traditional jurisprudence cited above.

30. Applying the above principles there is no doubt but that the industry comparisons show higher rates than those proposed by Local 1059. No doubt the Union attempted to tailor its demands to the realities of the somewhat unusual scenario, which occurred in this matter. In any case, I find that Local 1059's position should be given the greater credence. It is far from being capable of being described as a "breakthrough" result, especially when the rates are the same as those which were being paid the employees, when employed by Double M & M as of December 2011. Further, to award the company's position could certainly be viewed as "substandard relative to the industry in which the Company finds itself" (*Brick Warehouse Corp* supra). Further, it is not the role of this Board to facilitate a "race to the bottom", and thus, undermining the relative stability of the local cleaning industry, as seen from the comparisons.

31. Although there are only two companies which have set rates for 2014, being $13.15 (July 1, 2014), and $15.31 (May 1, 2014), the other comparisons show that the rates for 2012 and 2013 will, in the normal course of events, increase to those well above the 2014 rate proposed by the Union.

32. As regards Article 10.01 – Welfare, I accept the Union's position that given the sizeable drop in the number of hours of work it would be "fair and reasonable" to set the number of hours required to work per week at twenty (20) for benefits coverage to commence. The earlier access to benefits only partially addresses the greater drop in weekly hours and thus, gross salary.

33. In conclusion, I order that the parties enter into a collective agreement as set out at Tab 13, of Local 1059's brief filed its Section 43 Application, and filed in this matter. The wage rates in Appendix "A", Article 1 (found at page 16) shall be $11.25, effective January 1, 2012; $11.75 effective January 1, 2013; and $12.25 effective January 1, 2014. I further order that Article 10.01 mirror the Union's position per paragraph 32, above. I remain seized of all and any matters, which cannot be resolved by the parties.

34. I thank the parties for their assistance in this matter.

0902-12-M United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Applicant v. **Ledcor CMI Limited**, Responding Party v. Construction Workers Local 52 affiliated with the Christian Labour Association of Canada, Intervenor.

Right of Access - This is an application under section 13 of the *Labour Relations Act* for an access order in the context of an organization drive - Many of the Respondent's employees reside at a camp owned by a third party – The Applicant was denied access to

organize employees on the camp site – The Board can make an access order under section 13 of the Act in one of two situations: (1) the employee must either "reside on the property of the employer" or (2) "on property to which the employer has the right to control access" –The employer argued that the "right to control access" is tantamount to a right in ownership and that access to the camp is controlled by the third party who is the property owner – The Board found that access does not imply ownership and that the right to control access need not be exclusive to one party - The Board found that the Respondent controls access to the camp because the Respondent informs the third party who is, and who is not, to reside at the camp – The Board directed the Respondent to advise the third party that up to two representatives of the Applicant shall be admitted to the camp for the purpose of attempting to persuade the employees to join the Applicant – Right of access granted

BEFORE: *Brian McLean*, Vice-Chair.

APPEARANCES: *Robert Healy* and *John Stevens* appearing for the applicant; *Greg McGinnis* and *Bruce Berg* appearing for the responding party; *Maria Kotsopoulos, J.D. Alkema* and *Darren Schutten* appearing for the intervenor.

DECISION OF THE BOARD: July 9, 2012

1. This is an application under section 13 of the *Labour Relations Act*, 1995, S.O. 1995, c.1, as amended ("the Act") which states:

> **13.** Where employees of an employer reside on the property of the employer, or on property to which the employer has the right to control access, the employer shall, upon a direction from the Board, allow the representative of a trade union access to the property on which the employees reside for the purpose of attempting to persuade the employees to join a trade union.

2. The application occurs in the context of an organization drive by the applicant for the employees of the responding party. The employees are currently represented by the intervenor Christian Labour Association of Canada, Local 52, although those bargaining rights are under challenge.

3. The applicant has filed an application for certification. A representation vote is scheduled for July 10 and 11, 2012.

4. The employees at issue are working at a mine in Northern Ontario. The mine site is owned by AuRico Gold Inc. Ledcor is one of the companies with which AuRico has contracted to construct the mine.

5. There is a limited supply of workers who live in the area of the mine and a limited supply of housing for workers who need to be brought into work. Accordingly, AuRico contracted with a third party, Ednysian Camps and Logistics, to provide living and food services for many of the workers working at the minesite while they are working at the mine.

6. Many of Ledcor's employees stay at the camp while they are working. They work 12 hour shifts, seven days a week and then get the next week off. During their work week the employees stay at the camp and are bussed to and from the minesite.

7. The camp itself is located 4-5 kilometres from a small town. It is accessible by a public road. The camp is very close to the public road.

8. The camp is patrolled by security officers. Camp rules provide that no visitors may come on to the campsite. Camp residents must each week sign a form advising they will be bound by camp rules that are set and enforced by Ednysian.

9. Several of the contractors engaged by AuRico have their employees reside at the camp. There are therefore employees from several contractors staying at the camp at any given time.

10. The applicant has been attempting to organize Ledcor's employees for some time. In May one of the applicant's organizers was at the camp, without specific permission, for a few days (although he was not sleeping there). Eventually, camp management discovered the organizer and escorted him from the camp. Prior to doing so Ms. Labine of Ednysian, the camp's manager, wrote an email to a member of management at Ledcor, Craig Connell:

> "Do you know there is a union rep at the camp. I am listening to him talking. Is he supose to be here"(sic)

Mr. Cornell responded:

> "Louise, I am not sure we have employees that are also union shop stewards staying at camp, they should all be with CLAC union.
>
> I appreciate the information and will follow up. …"

11. On another occasion a different Ledcor manager Jim Kennedy wrote to Ms. Labine as follows:

> "Apparently a former Ledcor employee has been staying at camp since we terminated his employment.
>
> We have heard that Joey may be returning to the camp over the next few days and I wanted to make you aware of this.
>
> We think he may be staying with another Ledcor employee, Courtney Troock."

Decision

12. One of two situations must exist before the Board can make an access order under section 13 of the Act. The employee must either "reside on the property of the employer" or "on property to which the employer has the right to control access". Since there is no suggestion that the camp is the property of the employer Ledcor, the issue in this case is whether Ledcor has "the right to control access" to the camp.

13. The employer argues that the "right to control access" is tantamount to a right in ownership since only that kind of interest will give the "right" to "control" access. It also argues that "right" is a legal right which must be established with some relationship (contractual, property) for which a breach will produce a remedy. Since there is no contractual or other relationship between Ledcor and Ednysian, Ledcor has no right to control access. All access is controlled by Ednysian.

14. I disagree with the employer's argument. In my view "tantamount to ownership" is a much too narrow interpretation of the provision. An employer can have the right to control access with much less than rights than are tantamount to ownership. For example, the right can be delegated to the employer as agent for the owner. I also note that the right to control access need not be exclusive. More than one party can control access.

15. Here, Ledcor controls access to the camp for its employees by submitting to Ednysian a list of people who should have access. There is no suggestion the list is ever challenged; Ms. Labine, the manager of the camp simply accepts the individuals on the list for residence. Moreover, the extent of Ledcor's control can be found in the two email exchanges. In the first, Ms. Labine was asking Ledcor if the union's organizer should be in the camp and Ledcor was advising who should be there, and by implication who should not. In the second, Ledcor was advising Ednysian that it may wish to know that a terminated employee could be attending the camp.

16. I am therefore satisfied that Ledcor controls access to the camp. While Ednysian is the property rights owner (through its lease of the land and ownership of the temporary housing units placed on the land) and also controls access Ednysian has delegated part of its authority to select residents to Ledcor.

17. I also find no merit in the argument that the employees do not "reside" in the camp. In my view it is clear they reside there every second week (see *Great Lakes Forest Products Ltd.*, [1987] OLRB Rep. September 1163 at paragraph 27).

18. For all of the foregoing reasons I find it appropriate to make an Order *vis a vis* Ledcor as an employer with control of access to the camp. Accordingly the Board directs Ledcor to advise Ednysian that up to two representatives of the applicant shall be admitted to the camp for the purpose of attempting to persuade the employees to join the applicant on the following conditions (some of which the parties agreed to in the proceeding if the Board found in favour of the applicant):

> (i) Such individuals must sign up at the office before entering the camp;
>
> (ii) Such individuals must sign a form that they abide by camp rules;
>
> (iii) Such individuals must limit their presence in the camp to the office, the route to the recreation hall and the recreation hall;
>
> (iv) Such individuals may only attend the camp from 4:00 a.m. to 9:00 a.m. and 4:00 p.m. to 9:00 p.m. Starting Monday July 16, 2012, the hours are restricted to 5:00 p.m. to 9:00 p.m.; and
>
> (v) This order ceases to be in effect when the application for certification is determined.

1718-11-ES Organix Matters Inc., Applicant v. Director of Employment Standards, Responding Party.

Employment Standards – The employer, which provides manure transporting and spreading services to farms, took the position that it was exempt from the overtime and maximum hours provisions in the Act, in that it met the requirements prescribed in s. 2(2) of O Reg 285/01 which exempts farmers from those sections – The Board noted that in order to meet the requirements of the Regulation the employer's employees must be "employed on a farm" and their employment must be "directly related to the primary production" of one or more of a number of farming categories – Although noting that the employees did not have a direct employment relationship with the farmer, the Board did not decide whether the employees were employed on a farm, given its conclusion that the employer was not involved in the primary production of farming – The Board found that Organix's work did not involve direct contact with any of the agricultural products listed in the regulation; it did not seed, tend, grow or harvest an agricultural product; and it collected and moved manure and prepared soil so that others may engage in the primary production of agricultural products – The Board found Organix's work to be ancillary to the primary production of farm produce – Compliance order confirmed

BEFORE: *Kelly Waddingham*, Vice-Chair.

APPEARANCES: *Ted Oldfield* and *Scott Boldt* appearing for the applicant; *Natasha Wilson* appearing for the Director of Employment Standards.

DECISION OF THE BOARD: August 27, 2012

1. This is an employer's appeal of an Employment Standards Officer's Compliance Order made pursuant to the provisions of the *Employment Standards Act, 2000*, S.O. 2000, c.41, as amended (the "Act").

2. Organix Matters Inc. ("Organix") provides manure transporting and spreading services to farms. In September 2010, the Ministry of Labour conducted a test audit of Organix payroll and employment records, and found that the employer was in violation of section 22 of the Act, the overtime provision. The inspector issued Compliance Order No. 59099 to reflect the finding that Organix employees worked in excess of the maximum hours of work permitted by the Act, were not paid at the overtime rate for overtime work and worked more than the maximum number of hours without the required break for meals or rest.

3. The employer believes that Organix activities meet the requirements prescribed in section 2(2) of O. Reg. 285/01, which exempt farmers from sections of the Act, including maximum hours of work and overtime pay.

FACTS

4. Mr. Scott Boldt, the proprietor of Organix testified that Organix collects, transports and applies manure on agriculture land. Organix provides its services to approximately 200 beef, poultry, sheep, goats, rabbit, organic and cash crop farms.

5. According to Mr. Boldt, the size of farm operations has increased, there are fewer family farms and more "factory farms." However, there continues to be smaller "niche" farms, such as organic farming, where commercial fertilizers are not used and the use of manure is particularly important.

6. Organix is licensed under the *Nutrient Management Act*, 2002, S.O. 2002, c. 4 which regulates the manner in which prescribed materials such as manure are to be collected and spread. The *Nutrient Management Act* provides that large farms must have a plan regarding how manure is stored, the number of livestock and the crops grown. The *Nutrient Management Act* requires that a farm complete annual manure and soil samples to ensure that the crops chosen can be grown. Farms must record the tonnage of manure, where and when the manure was collected and how the nutrient was spread.

7. In accordance with the *Nutrient Management Act*, Organix provides manure and soil analysis prior to applying manure to ensure that they are not over applying manure which can cause environmental pollution. Organix also provides water testing during the application of the manure to ensure that manure is not reaching the tile drains which can have an adverse impact on the environment. Organix uses a box scale to weigh every load of manure which is recorded for the purposes of the *Nutrient Management Act*.

8. Organix does the primary tillage and injects manure into the soil thereby ensuring an even application of nutrients and reducing odour and nitrogen losses. Organix uses large pieces of agriculture equipment with specialized tire rims to prevent soil compaction to ensure the best root growth for crops and the best crop yields. Organix's process is fast and efficient. What traditionally took a week can be done in half a day. Farmers use Organix because it is cost effective and efficient. The farmer gets the benefit of Organix's spreading processes without having to make the large capital investment of buying the equipment.

9. The spreading of manure is weather sensitive. The soil must be sufficiently dry to ensure that equipment does not create ruts and mud soil compaction. Localized thunderstorms can delay the process of fertilizing and planting crops. If it is raining Organix's operations are shut down, often its technicians/workers that are sent home or work at Organix's shops to maintain equipment. Due to the vagaries of weather and a particular farm's planting schedule, Organix's technician often work 12 or more hours per day including evenings and weekends to ensure that the work is completed.

10. Spring is Organix's busiest season with the early application of manure on winter wheat plants to meet its nitrogen requirements. Organix then fertilizes hay and corn. When the first crop of hay has been taken there is an immediate requirement for the application of manure so that the second planting of hay is not burned. In the summer, Organix fertilizes summer soybeans and white beans. In the fall, Organix fertilizes winter wheat before snow falls, because under the *Nutrient Management Act* fertilizer can not be applied to frozen ground. In the winter, Organix's operations are mostly suspended with the exception of assisting farmers if a manure pit overflows.

APPLICANT'S ARGUMENT

11. Organix argues that, in the context of modern farming – in which subcontracting and specialization is increasingly common – Organix is a "farm" within the meaning of the Act. There are custom planters and harvesters.

12. Farming requires a specialized labour and skill set such as Organix employees who are licensed under the *Nutrient Management Act* to do manure spreading. Organix's nutrient management and fertilizing work is not only integral to farming, but is farming because the work is seasonal, weather-dependent, and related to primary production.

13. Organix's work is related to primary production because it takes place at the physical location where growing occurs and requires direct contact with the agricultural products. Organix relied on *Highline Produce Ltd.*, [2009] OESAD No 651 a case in which the Board considered if employees that packed and wrapped fresh mushrooms on a mushroom farm were engaged in work related to the primary production of mushrooms and, consequently, were subject to an exemption under section 2(2) of Regulation 285. The Board found that in order for work to be directly related to primary production, it had to be "hands on" work at a farm or place of growing, that deals with the product in its raw state and applied the exemption on that basis. Organix argues that "primary production" should include any step prior to a change to the product in its organic state, such as the necessary fertilization of a fruit, vegetable or grain.

14. Organix argues that the requirement that work be performed on a single farm, established in *976395 Ontario Inc. v. Burry*, 2001 CanLII 11999 (ON LRB) is an improper interpretation of the Act which is now outdated and no longer helpful to achieving the goal of the regulatory exemption: the protection of food production. Organix submitted that a broader definition of "farm" and "farmer" is required and to reflect definitions found in other legislation.

15. Organix highlighted the difference between the definition of "farm" applied in administrative of the Act and how Organix was defined in the context of other legislation, including the *Nutrient Management Act*, S.O. 2002, Chapter 4, sections 1-5; Retail Sales Tax Guide 807 – Farmers, Ontario Tax Reporter; *Agricultural Employees Protection Act*, S.O. 2002, Chapter 16; *Agricultural Labour Relations Act*, S.O. 1994, Chapter 6; *Farming and Food Production Protection Act*, S.O. 1998, Chapter 1, sections 1-4; and, *Farm Implements Act*, RSO 1990, Chapter F.4, sections 1-5. Under each of these regimes, Organix is considered an "agricultural operation," "person engaged in the business of farming," "agriculture," or user of "farm implement[s]."

DECISION

16. Section 2(2) of O. Reg. 285/01 to the Act, the farming exemption, provides:

> Subject to sections 24, 25, 26 and 27 of this Regulation, Parts VII, VIII, IX, X and XI of the Act do not apply to a person employed on a farm whose employment is directly related to the primary production of eggs, milk, grain, seeds, fruit, vegetables, maple products, honey, tobacco, herbs, pigs, cattle, sheep, goats, poultry, deer, elk, ratites, bison, rabbits, game birds, wild boar and cultured fish. O. Reg. 92/06, s.1.

17. The Act is remedial in nature and is designed to benefit employees by providing minimum protections and entitlements. Recently the Ontario Divisional Court in *Pensler v Adams*, 2012 ONSC 2369 (CanLII) upheld the Board's statutory interpretation that the Act be accorded a broad and generous interpretation in its application and that any exemptions to the Act must be given a narrow interpretation in order to achieve the statute's remedial objective. Exemptions should be construed narrowly to exclude as few employer-employee relationships as possible from the ambit of the Act's protections and obligations.

18. The farming exemption recognizes that employees working on farms and in food production do not fit within the commercial/industrial model because of the exigencies of farming such as weather conditions, the time of year, the availability of workers, the amount of daylight available. But the purpose of the Act remains the protection of workers and the insurance of minimum employment standards.

19. In order to fall within the exemption provided by section 2(2) of O. Reg. 285/01, Organix employees must be "*employed on a farm*" and their employment must be "*directly related to the primary production.*"

20. In *Burry, supra,* the Board considered the question of whether labourers employed by a company and dispatched to farms to catch chickens were *employed on a farm*. The Board found that the exemption applies to employees who are employed on a single farm and therefore the company's employees were not covered by the regulation. Given my conclusion below that Organix is not involved in the *primary production* of farming I need not consider if Organix employees are *employed on a farm*.

21. Organix employees are not engaged in farming. Organix is a commercial operation which provides a service to approximately 200 farms. Organix employees do not have a direct employment relationship with the farmer.

22. I do not agree that Organix is involved in the *primary production* of farm produce. Organix work does not involve direct contact with any of the agricultural products listed by the regulation. Organix does not seed, tend, grow or harvest an agriculture product. Organix collects and moves manure which is a farm by-product to a different site for farmers. Organix prepares the soil so that others may engage in the primary production of agricultural products, in much the same way that a technician installs a milking machine so that cows may be milked. While Organix's work is an integral part, it remains ancillary to the *primary production* of farm produce.

23. Organix may be considered under some legislation to be operating in farming or agriculture. Had the legislature intended the exemption to apply to commercial operations such as Organix it could have used the definitions used in other pieces of legislation under which Organix is considered an "agricultural operation," "person engaged in the business of farming," "agriculture," or user of "farm implement[s]" under other pieces of legislation. The Act's purpose is different from than other pieces of legislation because it has as its purpose, the protection of workers and the insurance of minimum employment standards.

24. For all the aforementioned reasons the application is dismissed. The compliance order is confirmed.

1103-12-M The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on its own behalf and on behalf of its Local Union, Carpenters and Allied Workers, Local 27, Applicants v. Universal Workers Union, Labourers' International Union of North America, Local 183, Aspen Ridge Homes Ltd., **Professional Carpentry Ltd.** and Dole Contracting Inc., Responding Parties.

Interim Order – Jurisdictional Dispute – The Carpenters sought an interim order in the context of a jurisdictional dispute over the assignment of certain carpentry trim work in the high-rise residential sector that was being performed by the Labourers – The Labourers, in a collective bargaining relationship with Provincial Carpentry, had been doing the trim work for approximately nine months when they were told they were being removed from the project and replaced by members of the Carpenters with a bargaining relationship with Dole Contracting – After one day of an informational picket established by the Labourers in protest of the re-assignment, the work was returned to Provincial and the Labourers – The Carpenters filed the jurisdictional dispute and sought to be placed on the project pending the outcome of the application – The Carpenters argued that the Labourers had engaged in illegal conduct by setting up the picket line and they should not be rewarded for these unlawful self-help efforts – The Labourers, for their part, denied any illegal conduct and argued that the Carpenters had not objected to the work assignment for nine months, and had not filed a grievance—in fact, could not do so—because they had no bargaining relationship with Provincial; it was only when the work was taken away from the Labourers and given to the Carpenters (and Dole) that the Carpenters were able to assert any rights over the work – The Board found that the Labourers, instead of waiting for the adjudication of its grievance or seeking a resolution to the jurisdictional dispute, intended to and did cause a work stoppage to protest the re-assignment of the work to the Carpenters: the conduct was improper and was not to be condoned – However, in the particular circumstances of this case, where it was not clear why Dole was awarded the work, and why it was being transferred to another contractor with a collective agreement with a different union, after nine months of uninterrupted (and unprotested) work by the Labourers working for Professional, and where a Carpenter win in the jurisdictional dispute would garner it a declaration only (the Board would not direct that the work be assigned to a particular contractor with a bargaining relationship with the Carpenters), the application for interim relief was dismissed

BEFORE: *Lyle Kanee*, Vice-Chair.

APPEARANCES: *Douglas Wray, John Moszynski* and *Frank Munno* appearing for the applicant; *Stephen Wahl* and *J. Cortez* appearing for Universal Workers Union, Labourers' International Union of North America, Local 183; *Christopher McClelland* and *Paul DiCecca* appearing for Professional Carpentry Ltd..

DECISION OF THE BOARD: July 24, 2012

1. The applicants seek an interim order under section 99(5) of the *Labour Relations Act, 1995*, S. O. 1995, c. 1 as amended (the "Act") in connection with a dispute over the assignment of certain work

performed at a high-rise residential condominium building known as "Scenic on Eglinton", which is located at 35 Brian Peck Crescent in Toronto (the "Project").

2. The Board proceeded with this application by way of consultation as permitted by section 99(3) of the Act. The parties filed declarations to establish the facts on which they intended to rely.

3. The applicants filed declarations of Frank Munno ("Munno"), a business representative for Carpenters and Allied workers, Local 27 ("Local 27") and Pablo Roman ("Roman"), a foreman for the responding party Dole Contracting Ltd. ("Dole"). Universal Workers Union, Labourers' International Union of North America, Local 183 ("Local 183") filed declarations of Pat Scaduto ("Scaduto"), its Assistant Sector Coordinator for low rise residential homebuilders; Jamie Cortez, Sector Coordinator for the high-rise residential sector; Louis Philippe, a business representative; and, Surya Churamani ("Churamani"), site construction superintendent at the Project. The responding party Professional Carpentry Ltd. ("Professional") filed the declaration of its president, Paul DiCecca ("DiCecca").

4. After carefully considering the declarations filed and helpful submissions of the parties, the Board concludes that this is not an appropriate case in which to grant the interim relief sought by the applicants. The Board's reasons follow.

Background Facts

5. The applicant, Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (the "CDC") is a council of trade unions made up of various local unions of the United Brotherhood of Carpenters and Joiners of America, in the province of Ontario.

6. Local 27 is a trade union that is a member of the CDC and represents, amongst other workers, trim carpenters in the high-rise portion of the residential sector of the construction industry in around Toronto.

7. Local 183 is a trade union that represents, amongst other workers, various workers in the high-rise portion of the residential sector of the construction industry in and around Toronto.

8. Aspen Ridge Homes Ltd., ("Aspen Ridge"), is a builder/developer of residential housing in and around Toronto.

9. Professional is a carpentry contractor, which regularly performs trim carpentry work in the high-rise portion of the residential sector in around Toronto.

10. Dole is a trim carpentry contractor, which performs work in around Toronto.

11. Local 183 is bound to a collective agreement with the Metropolitan Toronto Apartment Builders Association, ("MTABA") covering employees of builders in the high-rise portion of the residential sector of the construction industry in around Toronto. Aspen Ridge is bound to this agreement which, by virtue of statute, is in effect from May 1, 2010 April 30, 2013.

12. Local 183 and Professional are bound to a collective agreement covering, amongst others, trim carpenters in the high-rise portion of the residential sector of the construction industry in Board Area 8. By virtue of statute, this collective agreement is in effect from May 1, 2010 to April 30, 2013.

13. Local 27 is bound to a collective agreement with Dole covering high-rise trim carpentry in Board Areas 8, 9, 10, 11, and 18. This collective agreement is in effect, pursuant to statute, from May 1, 2010 to April 30, 2013.

14. Aspen Ridge has been engaged in the construction of the Project since 2011.

15. Pursuant to a contract dated September 1, 2011 Professional was retained on behalf of Aspen Ridge as the contractor responsible for the trim carpentry work on the Project. Professional performed trim carpentry work for Aspen Ridge on three previous high-rise construction projects in Toronto and is currently engaged to perform trim carpentry work on another project for Aspen Ridge located at 77 Charles St. in Toronto. It commenced work on the Project in or about September, 2011 and was continuing to perform such work in late June 2012.

16. On or about June 27, 2012, Professional's president DiCecca was advised by the general supervisor of the Project that an issue had arisen with one of the owners' brothers-in-law who operates a millwork business in the ICI sector and had a bargaining relationship with Local 27. DiCecca declares that he was advised by the general supervisor that this contractor, which he later learned was Dole, was requesting to replace Professional as the trim carpentry contractor on the Project and as a result Professional may lose some of its work on the Project.

17. On or about June 28, 2012 DiCecca was advised by the site superintendent, Churamani, that Professional would be removed from the Project as trim carpentry contractor and so it should not have its workers attend the Project on June 29, 2012. DiCecca directed his two workers not to attend the Project on Friday, June 29, 2012 but did not remove Professional's tools from the site. No formal steps were taken to terminate Professional's contract for the Project.

18. On June 28, 2012 Local 183 filed a grievance against Aspen Ridge alleging that the assignment of the trim carpentry work to Dole contravened the MTABA collective agreement.

19. At approximately 6:00 a.m. on July 3, 2012 representatives of Local 183 established a picket line at the entrance of the Project. Representatives of Local 183 asked workers attending at the Project to "respect" or "support" their picket line. Some trades, such as the electricians crossed the picket line and entered the Project to perform their work. However, according to the declaration of Churamani, "many of the trades working on the Project chose to respect LIUNA Local 183's information picket line."

20. Members of Carpenters Local 675 employed by the Project's drywall contractor and members of Local 27 employed by Dole who attended at the Project on July 3, 2012 did not cross the picket line. There is a controversy in the declarations as to whether these employees' access was obstructed or they simply chose not to attempt to gain access. For the purposes of this decision, as will be addressed later, it is not necessary to resolve this controversy.

21. No efforts were taken by Churamani or any other representative of Aspen Ridge to end the picket line.

22. DiCecca attended at the Project on July 3, 2012 and at about 9:30 a.m. spoke with the Project general superintendent to voice his objection to the recent developments. DiCecca indicated that Professional would sue if its contract on the Project was breached and that Professional intended to continue to work on the Project.

23. By approximately noon on July 3, 2012 the Project was shut down by Aspen Ridge and all workers in attendance left. Shortly thereafter Local 183's picket line was removed.

24. On July 3, 2012 the applicants and Local 675 filed an application under sections 100 and 144 of the Act seeking declaratory relief and a cease and desist order in respect to the picketing at the Project by representatives of Local 183 (the "cease and desist application").

25. Work on the Project resumed on July 4, 2012. There was no picket line. Neither Professional nor Dole had employees on site that day.

26. On July 4, 2012 DiCecca was contacted by Aspen Ridge's Vice-President of Operations and informed that a mistake had been made and Professional would continue to complete the trim carpentry work on the Project.

27. On July 4, 2012 the Board heard the cease and desist application. The Board dismissed the application as the alleged conduct had ceased and the circumstances did not warrant the Board issuing declaratory relief. (Board File No. 1039-12-U.)

28. On July 5, 2012 Professional returned to the Project and has continued to perform trim carpentry work on the Project since.

29. On July 6, 2012 Local 27 filed its section 99 application and this application for interim relief.

Positions of the Parties

Local 27

30. Local 27's primary argument is that Local 183 engaged in illegal conduct when it established a picket line at the Project on July 3, 2012 and as a consequence of its illegal conduct Aspen Ridge changed the assignment of trim carpentry work from Dole (Local 27) to Professional (Local 183). In a number of Board decisions including *SNC-Lavalin Power Ontario Inc.*, [2007] OLRD No. 3305 (additional reasons at [2007] OLRB Rep. July/Aug. 800) and *Bird Construction Company Limited*, [1984] OLRB Rep. Dec. 1688, the Board has granted interim relief to reverse assignments that unions have gained through similar self-help efforts so as not to reward such conduct.

31. Local 27 submits that the establishment of a picket line by Local 183 at the Project on July 3, 2012 is clearly unlawful conduct. It relies upon the declarations it filed disclosing efforts by representatives of Local 27 and members of Local 675 to enter the Project who were physically obstructed from doing so. It claims the intent of Local 183's picket line was obvious – to inhibit workers from entering the work site and shut down the Project so as to put pressure on Aspen Ridge to reverse the assignment of trim carpentry work in its favour. By admissions in declarations filed by Local 183, workers were asked to respect the picket line and many trades did. The decision by those trades people to respect Local 183's picket line likely constituted an illegal strike by those trades which was a "probable and reasonable consequence" of Local 183's actions. It matters not that some workers gained entry on to the Project and performed some work. Instead of waiting for the outcome of its grievance process, Local 183 chose to take matters into it's own hands and apply illegal pressure on the employer. The jurisdictional dispute process established by section 99 of the Act and the interim relief power of the Board pursuant to sections 99(5) and 99(6) were designed specifically to avoid such workplace disruption.

32. Local 27 submits that the status quo in this case is the situation immediately prior to Local 183 engaging in illegal conduct – Dole (Local 27) had been assigned the work. The Board should restore the status quo by granting interim relief in favour of Local 27. Local 27 has undertaken to expedite the final resolution of the jurisdictional dispute.

Local 183

33. Local 183 denies that it engaged in unlawful conduct. It submits its conduct is permitted by its constitutionally protected freedom of expression. It specifically denies that it physically interfered with Munno's entry into the Project or the entry of anyone else. It claims members of Local 27 were instructed not to seek entry into the Project and followed those instructions so as to buttress Local 27's argument that Local 183 was engaged in unlawful conduct. It points out that neither Aspen Ridge nor any other affected party sought the Board's assistance to enjoin or sanction Local 183's conduct at the Project on July 3, 2012.

34. Local 183 points out that even though Professional had been performing the work using Local 183 members since September 2011, Local 27 never filed a jurisdictional dispute claiming the work. It submits that is because Local 27 has no bargaining relationship with the owner Aspen Ridge or with Professional and so it has no reasonable prospect of success in its claim to have the work assigned to it.

35. Local 183 submits there is no contract between Aspen Ridge and Dole and the potential assignment of the work to Dole was never "consummated". It notes that Dole chose not to participate in the interim relief proceedings to protect its claim to the work. On the other hand, the uncontroverted evidence is that Professional's contract to perform work on the Project was never formally terminated.

36. Local 183 argues that like the situation in *Metric Contracting Services Corp.* [2008] OLRB Rep. May/June 428 there is no evidence that the decision to maintain Professional as the trim carpentry contractor was due to Local 183's illegal conduct. The evidence is that Aspen Ridge simply told Professional there was a "mistake".

37. Local 183 submits the status quo is represented by the 9 months Professional performed the work using Local 183 forces. That is also the current state of affairs and labour relations stability is best achieved by not interfering with it on an interim basis.

Professional

38. Professional makes no submissions about the legality of Local 183's conduct. It submits there is no evidence of any contractual relationship between Dole and Aspen Ridge and hence no legal claim by Dole to perform the work. On the other hand, Professional has a long standing relationship with Aspen Ridge and a binding contract to perform the trim carpentry work on the Project that was never terminated. The Board should not direct Aspen Ridge to breach their contract with Professional and enter into a contract with Dole.

39. Professional submits the Board's jurisprudence does not support an interim order awarding the work to Dole or to Local 27. Relying upon the Board's decisions in *Bondfield Construction Company (1983) Limited*, [2002] OLRB Rep. March/April 114 and *Elecon Electrical Contractors Inc.*, [1995] OLRB Rep. May 645, it argues the Board will not require an employer to sub-contract work to another employer and will not assign work to members of a trade union which has no collective bargaining

relationship with the employer which made the assignment of work. Accordingly, the Board is limited to declaring which trade has jurisdiction over the work in issue. Nothing would be gained by granting an interim order of that nature in these circumstances.

40. Dole and Aspen Ridge did not participate in the interim relief proceedings.

Decision

41. In *Groff and Associates* [1994] OLRB Rep. July 846, at paragraph 16, the Board explained that the overriding purpose of section 99 (then section 93) of the Act was to "provide a mechanism for resolving disputes over work jurisdiction without the disruption caused by the parties engaging in economic conflict…"

42. Accordingly, when faced with circumstances in which a trade union persists in threatening or engaging in work stoppages rather than waiting for adjudication through the statutory mechanisms, the Board has been concerned not to permit the trade union to retain any advantage or gain it acquired from its conduct. Normally, the Board will restore the work assignment to the situation in existence prior to the threat or actual work stoppage. (See *Bird Construction Company Limited, supra*; *SNC-Lavalin Power Ontario Inc. supra,* at pages 806-08)

43. On the basis of the declarations filed, the Board concludes that representatives of Local 183 attended at the Project on the morning of July 3, 2012 because they were concerned that Aspen Ridge was removing Professional as the trim carpentry contractor and were replacing it with Dole, which had a relationship with Local 27. It set up a picket line at the entrance to the Project for the purpose of protecting the assignment of the trim carpentry work to Professional and its employees. It asked other trades who attended work that morning to support them and to respect their picket line. Many of the trades did and did not enter the Project to perform their work. Consequently, work on the Project came to a halt around noon.

44. This is precisely the conduct and consequences that the mechanisms provided for in section 99 are intended to avoid. For the purposes of section 99(5) interim relief, the Board need not determine whether all of the elements required to support a finding of a breach of section 83 have been established. It is immaterial whether the conduct of Local 183 was contrary to the Act. See *Doef's Ironworks Ltd.*, [1980] OLRB Rep. July 965 at page 967 where the Board wrote:

> Section 81(8) [predecessor to section 99(5)] refers to a strike and does not differentiate between lawful and unlawful strikes. While it is the Board's experience that strikes which arise by reason … the assignment of work are usually unlawful strikes, the Board's jurisdiction under section 81(8) is not restricted to the imminence or occurrence of unlawful strikes.

See also *SNC-Lavalin Power Ontario Inc.*, [2007] OLRD No. 3305 at paragraph 14. Instead of waiting for the adjudication of its grievance or availing itself of the mechanisms provided for under section 99, Local 183 intended to and did cause a work stoppage to protest a work assignment to a competing trade union. Its conduct was improper. It is not to be condoned and certainly does not deserve reward.

45. In many circumstances, this conduct would justify a grant of interim relief in favour of the applicant union to restore the work assignment that was in existence prior to the improper work stoppage.

However, for the reasons discussed below, in these circumstances, the Board is not prepared to exercise its discretion in favour of granting the interim relief sought by Local 27.

46. In this case, trim carpentry work has been performed by Professional and members of Local 183 for over 9 months without objection by Local 27. For reasons that have not been fully explained, Aspen Ridge appears to have decided to change the assignment and grant the work to Dole. In fact, Dole has never worked on the site. At most, Dole may assert that it had a claim to perform the work in issue for two days. The strength of its contractual claim is unclear. Dole chose not to participate in the interim relief proceedings and no facts were presented in the declarations filed that explained why the assignment was made to it at this stage of the project, the terms of its contract or what it was told when Aspen Ridge decided to continue to have Professional perform the work. It would require very compelling reasons to alter an assignment that has been in effect for over nine months without objection.

47. As the Board in *Tembec Forest Products (1990) Inc.* [1995] OLRB Rep. Jan. 66 suggests at paragraph 21, characterizations of the status quo are often inseparable from the merits of the positions being advanced by the parties. Generally the Board's concern to preserve the status quo through interim relief is to provide a measure of labour stability pending the ultimate determination of the dispute. In this case, the Board is not satisfied that reversing a 9 month work assignment will further labour stability on the Project.

48. The Board has previously acknowledged that the absence of a bargaining relationship with the employer assigning the work is not a bar to a trade union bringing a jurisdictional dispute to the Board. (*Groff and Associates*; *Bondfield Construction*). However, as acknowledged by Local 27, strong labour relations reasons would have to be shown to compel the Board to change a work assignment from a trade union that has a bargaining relationship to a trade union that does not (*Bondfield Construction*, at paragraph 36). Accordingly, Local 27 has an arguable case, but not a strong case. While the Board on an interim application does not decide the ultimate merits of the underlying jurisdictional dispute, the strength of the applicant's case is a relevant factor for the Board to consider in exercising its discretion.

49. In response to the potential assignment of the trim carpentry work to Dole, Professional threatened to sue Aspen Ridge for breach of contract. It instructed its counsel to prepare a cease and desist letter to Dole claiming Dole has unlawfully induced Aspen Ridge to breach its contract with Professional. Professional has presented an executed contract retaining it as the trim carpentry contractor on the Project. There is no evidence before the Board that the contract was in fact terminated. The uncontroverted evidence before the Board is that on July 4, 2012 Professional was told by Aspen Ridge that there had been a "mistake" and that it would continue as the trim carpentry contractor on the Project. While not determinative, the impact of interim relief on existing contractual relations is a relevant factor for the Board's consideration.

50. Upon the determination of a jurisdictional dispute, the Board does not direct an employer to subcontract work to another particular employer. In its section 99 application (Form A-105) Local 27 seeks an interim order "directing that the work in dispute be assigned by Aspen Ridge to Dole Contracting Ltd. and to members of the Carpenters' Union." At the hearing, Local 27 conceded that the Board could not require Aspen Ridge to enter into a contract with Dole. In Schedule B to its application for interim relief it seeks an order: "That the work in dispute is to be assigned to members of the Carpenters' Union, effective immediately".

51. In *Bondfield Construction*, the Board, relying upon its earlier decision in *Groff and Associates*, concluded that the absence of a collective bargaining relationship would prevent the assignment of the

work in dispute to a particular craft trade union. On this point, the Board in *Bondfield Construction* focused on paragraph 19 of its decision in *Groff and Associates*:

> 19. Whatever PIGOTT #2 means, it does not mean that an employer which makes an incorrect assignment of work will necessarily have to assign that work to tradesmen who are members of a particular trade union, or even that it will have to alter the original assignment at all. The Board adjudicates jurisdictional dispute complaints which are brought before it, as between the parties to the particular complaints. The Board is not a labour relations Solomon sitting ever ready to divide up the work jurisdiction pie. However, even though a trade union party to a jurisdictional dispute complaint which has no applicable collective agreement may be unable to persuade the Board to order that work in dispute be assigned to its members, it may be able to persuade the Board to declare that the disputed work belongs to the trade its members practice, or even to order that it be assigned to persons who practice that trade. While this may result in somewhat of an empty victory to a trade union which chooses to bring a jurisdictional complaint in circumstances where it has no collective bargaining relationship with the assigning employer, it would at least give that trade union an opportunity to organize and obtain representation rights for non-union tradesmen through either voluntary recognition or the certification provisions in the *Labour Relations Act*. This is particularly true now that jurisdictional dispute complaints can generally be brought and disposed of quite quickly.

52. The Board in *Bondfield Construction* summarized its conclusions at paragraph 16:

> 16. Like the panel in GROFF we believe that the decisions in PIGOTT #1 and PIGOTT #2 failed to address the distinction between determining which trade is entitled to perform the work, and directing that the members of a particular craft union perform the work. We appreciate that in the unionized ICI sector of the construction industry, the distinction may be more academic than practical but the difference is more than semantics when applied to the task of the Board pursuant to section 99 of the Act. As the panel pointed out in GROFF, section 99 contemplates that parties without bargaining rights may participate in a complaint about work jurisdiction. However, the Board's determination about which trade has the jurisdiction should not be coupled with a determination that a particular trade union is entitled to do the work, unless it has the appropriate bargaining rights.

53. Accordingly, in this case, if Local 27's claim in the jurisdictional dispute is ultimately successful, the relief granted by the Board will be limited to a declaration that the work in issue belongs to the carpenters' trade. The Board will not direct that Dole or Local 27's members do the work. To grant Local 27 the interim relief it seeks would be to grant relief it will not be able to achieve on the final determination of the dispute. To simply grant an interim declaration that the work belongs to the carpenters' trade, will not, under the current circumstances, have any practical effect.

Conclusion

54. The conduct of Local 183 in establishing a picket line at the Project on the morning of July 3, 2012 and asking other trades to support their concerns about the assignment of the trim carpentry work on the Project by respecting their picket line and not entering the site was improper. It is precisely this kind of conduct that the Board's jurisdictional dispute mechanisms were intended to avoid. In most circumstances the Board would respond to this conduct by granting interim relief removing any work assignment that was gained from such improper conduct.

55. However, for the reasons discussed above, the Board concludes that, in these circumstances, it is not appropriate to exercise its discretion to grant the interim relief claimed by the applicants and their application is therefore dismissed.

56. This decision should not be construed by Local 183 or anyone else as the Board condoning unions engaging in these kinds of self-help remedies to work assignment disputes. Such conduct is not acceptable.

57. The Registrar will process the section 99 application in the ordinary course. This panel is not seized.

3396-11-R; 3792-11-U; 3795-11-R United Food & Commercial Workers, Local 206, Applicant v. **Tok Transit Limited**, Responding Party; Amalgamated Transit Union, Local 113, Applicant v. **Tok Transit Limited, The Regional Municipality of York and Bill Fisch**, Responding Parties v. United Food & Commercial Workers, Local 206, Intervenor; Amalgamated Transit Union, Local 113, Applicant v. **United Food & Commercial Workers, Local 206**, Responding Party.

Build-Up – Certification – Fraud – Intervenor – Reconsideration – Termination – Unfair Labour Practice – The Amalgamated Transit Union, Local 113 ("the ATU") intervened on a request for reconsideration of a certificate granted to the United Food & Commercial Workers, Local 206 ("the UFCW") with respect to transit operators employed by Tok Transit Limited – Additionally, the ATU filed an application for termination of the UFCW's bargaining rights on the basis of fraud and an unfair labour practices complaint – The ATU sought additional remedies beyond the revocation of the UFCW's certificate and the voiding of its collective agreement: namely, a Board direction to Tok Transit to file a notice setting out an accurate estimate of the number of employees in the bargaining unit at the completion of the alleged build-up; a dismissal of the application for certification for not attaining at least 40 per cent support in the built-up unit; and, an order for an additional vote with the ATU added to the ballot – The Board first considered whether the ATU had standing to intervene – The ATU argued that they had a necessary interest on the basis that the members represented by the ATU are substantially more than those members who constituted the initial bargaining unit – The UFCW submitted that the mere fact that the ATU has members among Tok Transit employees is insufficient to give the ATU standing – The Board determined that the ATU was not raising the issue of build-up for the purpose of delaying the vote; rather it was contending that the UFCW and Tok Transit concealed the fact of the build-up and the true numbers of individuals in the bargaining unit – On that basis, the Board granted party status to the ATU – Prior to

determining the request for reconsideration, the Board requested further submissions from the parties addressing the unusual remedies requested by the ATU – Matter continues.

BEFORE: *Patrick Kelly*, Vice-Chair

APPEARANCES: *Micheil Russell* and *Frank Ragni* appeared for United Food & Commercial Workers, Local 206; *Donald Eady, Danny Kastner, Bob Kinnear, Frank Grimaldi* and *Rocco Signorile* appeared for Amalgamated Transit Union, Local 113; *Joe Morrison* and *Ajay Mehra* appeared for Tok Transit Limited; *Simon Mortimer* appeared for The Regional Municipality of York and Bill Fisch.

DECISION OF THE BOARD: August 9, 2012

Background

1. Board File No. 3396-11-R is an application for certification under the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") in which, by Board decision dated February 7, 2012, the Board granted a certificate to United Food & Commercial Workers, Local 206 ("the UFCW") with respect to transit operators employed by Tok Transit Limited under contract with the Regional Municipality of York ("York"). The agreed bargaining unit contained five individuals at the time the application for certification was filed on January 20, 2012. By way of a request for reconsideration of that decision, Amalgamated Transit Union, Local 113 ("the ATU") seeks to intervene in that matter.

2. In addition to this request for reconsideration, the ATU has filed an application for termination of the UFCW's bargaining rights (Board File No. 3795-11-R, "the termination application") on the basis that the certificate granted to the UFCW was obtained by fraud, and an unfair labour practice complaint (Board File No. 3792-11-U, "the complaint") alleging violations of the Act by Tok Transit, Bill Fisch and York.

3. All three ATU applications were filed on March 1, 2012.

4. These matters arose following the commencement of a lengthy transit strike by employees of companies providing transit services to York, including employees of a transit company that bargained with another local of the Amalgamated Transit Union. Apparently, York terminated its contract with that transit company in mid-January 2012, which led to the layoff or termination of employment of the transit company's many employees. Not long afterward, Tok Transit entered into a contract with York to provide transit services (precisely when the contract was executed is a matter of some dispute). The UFCW applied for certification on January 20, 2012. Among the many allegations made by ATU in these matters is that the UFCW and Tok Transit knew, but did not disclose (and ought to have disclosed) to the Board, that a significant build-up of the bargaining unit sought by the UFCW was imminent. The ATU contends that the application for certification was brought prematurely (allegedly aided and abetted by York and Mr. Fisch), when there were only five individuals in the bargaining unit, for the purpose of undermining the right of the majority in the bargaining unit – which since February 2012 includes members of the ATU - to choose the bargaining agent.

5. The hearing in these matters commenced on June 11, 2012. The parties agreed that the first issue to be determined by the Board concerns the ATU's standing to intervene in the application for certification and to bring the other two applications. The UFCW and Tok Transit take the position that the ATU ought not to be granted standing as a party in any of these matters. Counsel for York and Bill Fisch, York's Regional Chair, took no position on that issue, but it did give notice that it seeks an order

from the Board striking Mr. Fisch as a party in the complaint, and that it intends to bring a *prima facie* motion to dismiss the complaint.

6. Counsel for the UFCW prepared a helpful chronology of the events leading up to the ATU applications and request for reconsideration. It reads as follows:

Date	Event
January 20, 2012	UFCW files an Application for Certification for a bargaining unit of employees at TOK
January 25, 2012	Board directed that a Certification vote be conducted on January 27, 2012
January 27, 2012	Date of representation vote
February 7, 2012	Board issued a decision certifying UFCW Local 206
February 13, 2012	UFCW sends notice to bargain to TOK
February 17, 18, 23, 24, 25	TOK and UFCW bargain
February 21, 2012	4 ATU cards signed
February 22, 2012	9 ATU cards signed
February 23, 2012	1 ATU card signed
February 24, 2012	1 ATU card signed 1 card is undated 1 card is dated Feb 12
February 28, 2012	Ratification vote attended by 51 employees, 100% of whom voted in favour of collective agreement.

7. A few further "facts" round out the context in which the issue of the ATU's standing is to be considered, particularly its standing to intervene in the application for certification for the purpose of reconsideration of the Board's decision certifying the UFCW. As of May 4, 2012, there were, according

to the information provided by Tok Transit, ninety-three employees in the bargaining unit. Having reviewed the ATU membership cards against the information provided by Tok Transit, I can confirm that all seventeen of the individuals who ultimately signed ATU membership cards were employed (and may still be) by Tok Transit at some point in February 2012; fifteen of them after the representation vote taken on January 27, 2012 but before the certificate was issued to the UFCW on February 7, 2012; two of them after the certificate was issued. All of the cards (with the exception perhaps of one undated card) were therefore signed after the signatories commenced employment with Tok Transit (and, obviously, after the Board certified the UFCW), but before the vote to ratify the collective agreement. The membership cards are applications for membership in the ATU, but also authorizations by the individual signatories permitting the ATU "to act for me as my collective bargaining agent in all matters pertaining to wages, hours, and other terms and conditions of employment". The ATU filed the request for reconsideration and the two applications previously described on March 1, 2012, sixteen business days after the Board granted the UFCW its certificate, and within the twenty-day period for reconsideration contemplated by Rule 18.3 of the Board's Rules of Procedure.

8. Finally, to complete the background context, it bears pointing out that the ATU seeks an assortment of remedies in these matters, over and above the revocation of the UFCW's certificate and the voiding of its collective agreement with Tok Transit. Among them are:

> • a Board direction to Tok Transit to file a section 8.1 notice in the UFCW application for certification, setting out an accurate estimate of the number of employees in the bargaining unit as at the completion of the alleged build-up; followed by
>
> • a dismissal of the application for certification under subsection 8.1(5) (because the UFCW did not have at least 40 per cent support of the individuals in the built-up unit);
>
> • followed by the ordering of an additional vote pursuant to section 111(5) of the Act in which the Board permits the ATU "to be added to the ballot."[8]

Arguments of the Parties

9. The ATU's position is set out in its pleadings, which read (footnotes deleted):

> ...
>
> 38. In order to obtain standing in certification proceedings, a union must demonstrate that it is either:
>
> a) the bargaining agent for the employees in the bargaining unit or
>
> b) that it represents one or more persons in the bargaining unit in question.

---

[8] It is not clear to me whether the *addition* of the ATU to the ballot implies that the UFCW would also be on the ballot, although that would seem to be incongruous if the UFCW were found by the Board to have committed a fraud and, as a result, the Board revokes its certificate.

> 39. Provided it has the necessary interest, a union may seek to intervene in certification proceedings at first instance, or for the purpose of reconsideration. In *Printing Specialties & Paper Products Union, Local 701 v. Atlantic Packaging Products Ltd.*:
>
> > We are of the view that so long as a party seeking to intervene, either in the first instance or for the purpose of reconsideration, demonstrates the necessary degree of interest the Board should grant status and decide the matter on the merits.
>
> 40. ATU 113 currently represents a significant number of employees in the operator bargaining unit at TOK. The members represented by ATU 113 number substantially more than those members who allegedly constituted the bargaining unit on January 20, 2012 and who voted in the certification vote on January 27, 2012. ATU 113 has filed membership evidence with the Board to demonstrate its representational interest…
>
> 41. ATU 113 represents several Operator bargaining units, including 2 currently providing services to York Region transit via private contractors.
>
> 42. ATU 113's interest in these proceedings is sufficient to grant it intervener status and for the Board to consider ATU 113's request for reconsideration on the merits.

10. The UFCW's position is as follows. The mere fact that the ATU has some members among Tok Transit employees represented by the UFCW is insufficient to give the ATU standing. The ATU membership cards filed in this matter do not on their face authorize the ATU to intervene in any legal contest in which it may take an interest, and certainly do not expressly or implicitly sanction an intervention by the ATU in the UFCW application for certification. Furthermore, none of the ATU membership cards were signed when the UFCW applied for certification, or when the vote was held, or even when the certificate was issued. The ATU did not intervene in the UFCW application, presumably because it had no members signed up during the period from the date of application (January 20) until the date the UFCW was certified (February 7), and therefore had no realistic hope of acquiring bargaining rights through its own application for certification. Accordingly, the ATU evidence is, in the submission of the UFCW, *ex post facto*. The UFCW contends that to rely upon the ATU membership evidence, given when it was obtained, would be to encourage trade unions to engage in an endless cycle of litigation after the fact, by merely acquiring members in existing bargaining units. Accordingly, the ATU ought not to be granted standing.

11. Tok Transit agreed with the submissions of the UFCW, and added the following submissions. The events surrounding the transit strike and the termination by York of the other transit company's subcontract were widely known to, among others, the ATU. It would therefore not have been difficult to anticipate an application for certification like that brought by the UFCW. On February 28, 2012, 51 employees, including ATU members in the UFCW bargaining unit, voted unanimously in favour of ratification of a collective agreement. It was only after the collective bargaining process was complete that the ATU then intervened, and seeks thereby to disrupt the negotiated terms and conditions of employment for this workplace. In all the circumstances, therefore, it is too late for the ATU to claim, and the Board should exercise its discretion not to grant, party standing.

Analysis and Conclusions

12. A good deal of the parties' arguments centred around a decision of the Board more than thirty years ago in *Atlantic Packaging Products Ltd.*, [1980] OLRB Rep. January 4, as well as some earlier Board decisions cited in that case. In *Atlantic Packaging* a trade union ("the incumbent union") was certified by the Board on August 24, 1979 for a two-person bargaining unit. Approximately seven weeks later another trade union ("the second union") applied for certification of the same unit only to be faced with the incumbent union's assertion that its certificate barred another application for certification. The second union requested intervenor status in the incumbent union's application for certification for the purpose of seeking reconsideration of the Board decision granting the certificate, on the basis that there had been a build-up of the workforce to fifteen employees in the intervening weeks. The second union claimed membership in nine of the fifteen employees. By the time the hearing into the request for reconsideration took place, another union ("the third union") also requested intervenor status in the original application for certification on the same basis – build-up – as the second union. The third union filed membership evidence in respect of three employees in the bargaining unit. It would appear that when the matter came on for hearing, the incumbent union had not yet negotiated a collective agreement.

13. The incumbent union resisted the request of the second union and the third union to obtain intervenor party status, arguing that the certification proceeding had been completed and could not be reopened thereafter because to do so would destabilize the workplace. The incumbent union relied upon prior Board decisions in *Delcon Electric Limited*, [1976] OLRB Rep. July 362 and *Formrite Forming Ltd.*, [1971] OLRB Rep. February 49. *Formrite Forming* involved a request for reconsideration by a trade union of a decision eight months earlier certifying another trade union, on the grounds of alleged employer support. The union seeking to intervene had one member in the impugned bargaining unit, but that person had not been a member on the date the certificate was issued by the Board. The Board in that case determined that, because the certification proceeding was completed with the issue of a certificate, and because the trade union seeking to intervene did not have a member on the date the certificate issued, there was no longer any proceeding to which another party could be added.

14. A similar result obtained in the *Delcon Electric* decision, where, again, a trade union sought intervenor party status in very similar circumstances (alleged employer support of the incumbent union), seven months after the Board's decision certifying the incumbent trade union. The union seeking intervenor status obtained two members in the bargaining unit in question about five months after the certification proceeding ended. Again, the Board concluded that the union had not established status as of the day the certification proceeding drew to a close.

15. The Board in the *Atlantic Packaging* decision rejected any notion that, once a certificate issued, the decision granting certification is beyond reconsideration, and to the extent the *Formrite Forming* and *Delcon Electric* cases stood for such a proposition, the panel in *Atlantic Packaging* disagreed with it. The Board pointed out that it has a broad discretion under what is now subsection 114(1) of the Act to reconsider any decision "if it considers it advisable to do so" In that case, the Board found it was advisable to exercise its discretion to reconsider, even though the decision certifying the incumbent trade union had been made seven weeks earlier. That is because the second and third unions demonstrated the necessary degree of interest (membership) to obtain party standing. It did not matter to the Board that the members joined the second and third trade unions after the certification proceeding ended. It would appear that a key factor in the Board's reasoning was the significant expansion of the number of individuals in the bargaining unit following certification of the incumbent trade union.

16. Not surprisingly, the UFCW urges me to distinguish *Atlantic Packaging*, on the basis that it was decided at a time when the statutory framework was quite different, and the Act did not contain section 8.1 and did not require quick representation votes in all applications for certification in the industrial sector. The UFCW says the concept of build-up as a principle no longer applies in the new era, and in any event, it only lies in the mouth of an employer to raise the principle of build-up and a section 8.1 objection, not an intervening trade union. The UFCW contends that I ought to adopt the approach in the *Formrite Forming* and *Delcon Electric* cases, (which, it should be pointed out, pre-date *Atlantic Packaging*, and like it, were decided in an era long before section 8.1 was enacted).

17. The UFCW also referred me to *Ontario Hydro*, [1997] OLRB Rep. July/August 700, in which an application for certification by a Local of the International Brotherhood of Electrical Workers ("the IBEW") in the construction industry was under consideration by the Board. The intervenor trade union, Power Workers Union ("the PWU") had previously tried and failed to obtain certification from the Board in three applications for the same construction electricians who were the subject of the IBEW application. As the Board noted, there was an ongoing struggle to represent these electricians employed by Ontario Hydro. In fact, one of the three previous PWU applications for certification was filed as a pre-emptive response to the anticipated IBEW application. The PWU asserted its right to intervene in the IBEW application on the basis of the membership evidence it filed on behalf of eight individuals in its three dismissed applications.

18. The Board said that mere evidence of membership in a trade union does not necessarily confer representational authority to participate in another trade union's application for certification. Whether representational authority has been conferred depends on the circumstances. The Board noted that the PWU membership evidence had been collected for a specific purpose, i.e., to obtain PWU representation rights via certification in respect of the electricians in their employment by Ontario Hydro, not for the purpose of having the PWU challenge the IBEW application. Furthermore, the Board considered the content of the PWU membership and concluded that it was not in the form contemplated by the PWU constitution. Even if the PWU membership evidence could be interpreted to clothe the PWU with representational authority, the Board observed that five of the eight individuals who had signed cards had formed a group of objecting employees who were participating in the IBEW application, apparently independently of the PWU. The Board was not prepared to grant the PWU status unless all eight individuals opted for representation by the PWU to represent them as a group.

19. I note that the decision in *Ontario Hydro* did not take into account any of the Board's caselaw on party standing. Furthermore, the application for certification brought by the IBEW was a manifestation of a much larger and ongoing battle between trade unions vying to represent a group of employees. It did not involve any issue of build-up.

20. Counsel for Tok Transit drew my attention to *Karson Kartage & Konstruction* (1994) Ltd., [2000] O.L.R.D. No. 354, a construction industry matter involving an application for certification by Labourers International Union of North America, Local 527 ("Local 527") and, among other things, an allegation that the employer had participated in the formation, selection or administration of the incumbent trade union by contributing financial or other support. The incumbent trade union had been certified five months prior to the application for certification by Local 527. Local 527 relied upon the membership evidence in its application for certification as the basis for its entitlement to standing as a party requesting reconsideration of the Board's decision certifying the incumbent trade union. The Board said even if that membership evidence revealed that at least one member of Local 527 was in the bargaining unit at the time the incumbent trade union applied to be certified, the fact of the matter was that Local 527's delay in filing its application for certification (and its request for reconsideration) was

simply too lengthy. Relying on the decisions in *Formrite Forming* and *Delcon Electric*, the Board determined that it would not entertain Local 527's application for certification and/or its request for reconsideration, and stated at paragraph 4 that:

> ...Were it otherwise, there would never be any finality to a certificate issued by the Board. A certified trade union would be faced with potentially, an endless series of applications for reconsideration by one or another disenchanted employee who has obtained the support of a rival trade union.

21. In a subsequent Board decision (2000 CanLII 12895 (ON LRB)) dealing with a request for reconsideration by Local 527 regarding the Board's determination not to grant Local 527 standing, the Vice Chair in *Karson Kartage* matter exercised his discretion to reconsider his determination on Local 527's standing in light of the *Atlantic Packaging* decision which had not been previously brought to his attention. He acknowledged that *Atlantic Packaging* suggested that his earlier decision had been overly broad. He noted that the situation in the *Atlantic Packaging* case involved a build-up issue, and that it would have been unfair in those circumstances to deny the intervenor trade unions party status. However, the Vice Chair did not see any reason to change his earlier decision in the circumstances before him.

22. The authorities cited by the parties, particularly the cases I have specifically referred to, are not easily reconciled. The granting, or not, of party status is a matter of discretion. I agree with the notion that the Board ought to be "strongly influenced by the practical need for finality in reconsidering any of its decisions."[9] The Board also has to be sensitive to context and all the circumstances before it. It appears undisputed that the UFCW bargaining unit expanded exponentially in membership from the date of filing of the UFCW's application for certification on January 20, 2012 (when there were five individuals in the bargaining unit, which then doubled to ten by the date of the representation vote on January 27, 2012) to March 1, 2012 when the ATU filed its request for reconsideration accompanied with evidence that seventeen persons in that unit had applied for membership in the ATU. Fifteen persons who became employed during that expansion did so after the representation vote was ordered and held, but before the certificate issued to the UFCW, and those fifteen persons signed ATU membership cards not long after the UFCW was certified. Two more individuals, who were employed by Tok Transit the day after the certificate was issued to the UFCW also signed up with the ATU. This does not appear to be the kind of case suggested by the Board in the *Karson Kartage* decision, presaging an endless cycle of reconsideration by a disenchanted employee who happens to find support for his cause by another trade union. Nor does it resemble the case in *Ontario Hydro*, where it appears the PWU was simply attempting to salvage something from its previous defeats at the Board. Moreover, the case before me is distinguishable form the *Formrite Forming* and *Delcon Electrical* decisions in that the ATU brought these matters, not several months after the certificate issued, but within approximately three weeks, during the reconsideration period following the Board's decision certifying the UFCW.

23. This case is more like the situation in *Atlantic Packaging*, where the Board appears to have been influenced to grant standing to the intervenor trade unions because, though their membership evidence was obtained seven weeks (or longer) after the certificate was issued to the incumbent trade union, there had been a significant build-up in the workforce. I do not necessarily agree that the principle of build-up no longer applies in the era of section 8.1. The Board has in fact considered build-up arguments since section 8.1's enactment. In any event, the ATU is not raising the issue of build-up for the purpose of delaying the vote. It is contending that the UFCW and Tok Transit conveniently concealed

---

[9] *Atlantic Packaging Products Ltd., supra*, ¶ 9.

the fact of the build-up and the true numbers of individuals in the bargaining unit, and should have disclosed that information to the Board.

24. For these reasons, I exercise my discretion to grant the ATU party status to raise its request for reconsideration and to pursue its one termination application and its complaint.

25. Having arrived at this conclusion, however, does not mean that I have exercised my discretion to reconsider the Board's decision certifying the UFCW. In my view, an important factor to consider in the exercise of that discretion is whether the ATU can gain anything by way of remedy that it could not otherwise gain in its complaint and/or the termination application.

26. As I pointed out earlier in this decision, besides the revocation of the UFCW's certificate and the voiding of its collective agreement with Tok Transit – remedies the ATU might gain regardless of a decision by the Board to reconsider the decision granting certification to the UFCW – the ATU seeks:

- a Board direction to Tok Transit to file a section 8.1 notice in the application for certification, setting out an accurate estimate of the number of employees in the bargaining unit as at the completion of the alleged build-up; followed by

- a dismissal of the application for certification under subsection 8.1(5) (because the UFCW did not have at least 40 per cent support of the individuals in the built-up unit);

- followed by the ordering of an additional vote pursuant to section 111(5) of the Act in which the Board permits the AUT "to be added to the ballot."

27. These are highly unusual remedies, to say the least. Even assuming that the Board could or should make one or more or all of the orders/directions/declarations described above, what end would they serve? How could the Board give effect to a vote under subsection 111(5), even one that might go in favour of the ATU, in circumstances where there is no application for certification by anyone, including the ATU (other than, as urged by the ATU, a dismissed UFCW application pursuant to subsection 8.1(5)), or any other proceeding by which the Board could confer representation rights on the ATU for the bargaining unit currently represented by the UFCW? In other words, where is the Board's jurisdiction to declare the ATU as the bargaining agent? If the Board has no statutory authority to grant that ultimate remedy to the ATU, what is the purpose of the rather convoluted remedial path the ATU wants the Board to follow? Why should the Board not simply refuse to reconsider the decision certifying the UFCW, and leave the question as to whether or not the UFCW certificate should be revoked and its collective agreement declared void for a determination by the Board in the other proceedings that the ATU has brought?

28. Before these matters proceed any further, the ATU must respond to the questions posed by the Board in the preceding paragraph. The ATU's written submissions are to be provided on or before August 17, 2012. The other parties have until August 27, 2012 to file and deliver submissions in response. Any reply submissions of the ATU are to be provided on or before August 30, 2012.

COURT PROCEEDINGS

3122-04-G (Court File No. C54934) Greater Essex County District School Board v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 and Ontario Labour Relations Board

Construction Industry Grievance – Judicial Review – Timeliness – The Board had originally held that it had the discretion to accept a grievance referral under s. 133 of the Act, notwithstanding the language in the collective agreement that deemed a grievance filed beyond 14 days to be settled – On judicial review, applying a standard of reasonableness, the Divisional Court quashed the Board's determination: [2011] OLRB Rep September/October 629 – On appeal, the Court of Appeal upheld the Divisional Court ruling: the Board had to apply the terms of the collective agreement which deemed the grievance settled if it was not referred to arbitration within 14 days — The Court said the Board did not have the right to ignore the express terms of the collective agreement that addressed the grievance and arbitration procedures – Appeal dismissed

Superior Court of Justice (Court of Appeal), *O'Connor A.C.J.O, Feldman* and *Ducharme JJ.A.*, July 10, 2012

Ducharme J.A.:

A. INTRODUCTION

[1] This appeal involves another in a series of skirmishes between the Greater Essex District School Board (the "School Board") and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (the "Union"). The Union represents workers in the construction industry, while the School Board is bound to the Union's provincial collective agreement governing construction work (the "Collective Agreement").

[2] The narrow issue before us in this case is whether a grievance filed by the Union in July 2004, but not referred to arbitration until December 2004, four months beyond the 14-day time limit for referral of a matter under the Collective Agreement, is nonetheless arbitrable before the Ontario Labour Relations Board (the "Labour Board" or the "OLRB") by virtue of the powers vested in the Labour Board under s. 133 of its enabling statute, the *Ontario Labour Relations Act, 1995*, Sched. A, (the "Act"). (For easy reference, s. 133 and all other applicable statutory and Collective Agreement provisions are included at Appendix "A".)

[3] Section 133 allows a party to a collective agreement in the construction sector to refer a grievance to the Labour Board for final and binding arbitration; it also empowers the Labour Board to refuse to accept a referral. What is the scope of the Labour Board's powers under that section? Does it have the authority to accept a referral of any matter or difference between the parties to a collective agreement, including, for example, a grievance that is no longer a grievance? That is the larger issue overhanging and animating the narrower one relating to the particular July 2004 grievance in question.

[4] In January 2009, nearly five years after the filing of the grievance, the Vice-Chair of the Labour Board decided that the grievance and arbitration procedures set out in the Collective Agreement between these parties were "separate and distinct," and that while the provisions relating to steps taken in the grievance procedure were mandatory, those relating to the referral of a grievance to arbitration were directory only. He commented upon the very broad language of s. 133(1), and went on to interpret the section in the very same fashion.

[5] In the Vice-Chair's view, the Labour Board possesses essentially an unfettered authority to relieve any party – in this case, the Union – from any and all requirements of the grievance and arbitration procedure, other than the need to file a grievance in the first place. In a decision dated January 5, 2009, he concluded that, irrespective of the time limits in the Collective Agreement, he had and would exercise the discretion to extend the time for referral of the grievance to himself for arbitration (the "Jurisdiction Decision").

[6] In May 2010, sixteen months after releasing the Jurisdiction Decision, the Vice-Chair decided the grievance in the Union's favour. He rejected the School Board's only defence, an argument based upon the doctrine of promissory estoppel. He declared that the School Board had violated the Provincial Collective Agreement, and ordered an assessment of damages (the "Arbitration Decision").

[7] The School Board applied for judicial review of both decisions. In Reasons for Judgment released on October 7, 2011, the Divisional Court (J. Wilson, R. Smith, and Hoy JJ.), 2011 ONSC 5554 (CanLII), 2011 ONSC 5554, 107 O.R. (3d) 453, held that the Jurisdiction Decision was unreasonable on the ground that the Labour Board had no jurisdiction to hear the grievance on any basis. In the light of that conclusion, the Divisional Court considered it unnecessary to undertake a detailed analysis of the Arbitration Decision, and it too was quashed for lack of jurisdiction.

[8] In this appeal, the Union claims chiefly that the Divisional Court improperly applied the "reasonableness" standard in assessing the Vice-Chair's Jurisdiction Decision, and erred in finding that his interpretation of s. 133 was wrong or unreasonable.

[9] For the reasons that follow, I conclude that the Divisional Court did not err in declaring the Vice-Chair's Jurisdiction Decision to be unreasonable, and I would dismiss the appeal accordingly.

B. BACKGROUND

[10] The School Board was created on January 1, 1998, to replace the former Essex County Board of Education and the former Board Of Education for the City of Windsor. The merger in 1998 was government-mandated and accomplished by way of the *Public Service Labour Relations Transition Act, 1997*, S.O. 1997 c. 21, Sch B.

[11] Before the merger, the City of Windsor School Board was bound by provincial collective agreements with the Union and other construction unions, but the Essex County Board of Education was not. Thus, while the Windsor Board was restricted to hiring workers bound to provincial collective agreements, the Essex Board was free to hire both unionized and non-unionized workers, as it saw fit.

[12] Following the merger, and for at least another six years, the School Board's hiring practices relating to construction industry workers did not change. In other words, construction industry work within the geographic areas of the old City of Windsor Board was subject to the Union's bargaining rights; this same work in the geographic areas of Essex County beyond Windsor was not.

[13] All the while, tensions between the parties simmered and grew. In June 2004, the Union formally took the position that the School Board was bound by the Collective Agreement for all construction work performed in the merged School Board. In August 2004, the School Board responded by filing an application seeking a declaration pursuant to s. 127.2 of the Act that it was not an employer in the construction industry.

[14] The Union fired back. It and several other construction trade unions applied to the Labour Board under s. 1(4) of the Act for a declaration that the School Board was a "single employer" under the Act. On January 4, 2006, the OLRB granted the Union's application and declared that the City of Windsor School Board and the Essex County Board of Education were one employer for all purposes under the Act, retroactive to the date of merger in 1998. The School Board's application for judicial review of that decision was dismissed. In the result, the former Essex County Board of Education is now bound by the Collective Agreement, as well as by provincial collective agreements with various other construction unions, to the same extent as the former City of Windsor School Board.

[15] About three years later, in February 2009, the OLRB dismissed the School Board's s. 127.2 application for a declaration that it was a non-construction employer. The School Board's application for judicial review of this decision was also dismissed by the Divisional Court.

[16] I turn again to the matter of the Union's grievance of July 27, 2004, which of course pre-dated all these latter machinations between the parties before the OLRB and the courts. The grievance initially alleged that the Board had hired workers who were not bound by the Collective Agreement to do work at two schools. Though the grievance was later amended to include other alleged infractions of the Collective Agreement, the Union did not refer the grievance to arbitration before the OLRB until December 9, 2004, more than four months beyond the 14-day time limit for referral of a matter to arbitration under the Collective Agreement.

[17] The OLRB Vice-Chair to whom the grievance was referred adjourned the grievance *sine die*, pending resolution of the other proceedings between the parties.

[18] In 2005, the School Board tendered three contracts in the area of the former Essex Board to contractors employing non-unionized workers. On August 19, 2005, the Union amended the July 27, 2004 grievance to include the three projects.

[19] On January 4, 2006, the Labour Board issued its decision on the Union's related-employer application, and in that decision granted the Union bargaining rights retroactive to amalgamation. As a result, the Provincial Collective Agreement was made applicable to construction work performed by the School Board within its geographic jurisdiction retroactive to January 1, 1998, which now included, for the first time, construction work performed within the geographic jurisdiction of the former Essex County Board of Education. The related-employer application having been decided, the July 27, 2004 grievance was re-listed for arbitration, which brings us back to the decisions under review on this appeal.

C. DECISIONS BELOW

(i) Vice-Chair's Decisions

[20] The Vice-Chair noted that the December 9, 2004 referral of the July 27, 2004 grievance was untimely, because the Collective Agreement provided only for a 14-day period during which a grievance may be referred to arbitration. The relevant provisions in the Collective Agreement are as follows:

ARTICLE 17 – GRIEVANCE PROCEDURE

> 17.2 . . . .Where there is no Board, the difference may proceed directly to arbitration under the provisions set out in Article 18, within fourteen (14) regular working days from the date the grievance arose, but not later. Any time limits stipulated in this Article may be extended by mutual agreement of the parties in writing.
>
> 17.3 Any grievance submitted by the employee, the Union, the Zone Association or the Contractor, that has not been carried through Article 17 – Grievance Procedure Clauses and in accordance with the time limits specified, or mutually agreed to, will be deemed to have been settled satisfactorily by the parties of the grievance.

ARTICLE 18 -- ARBITRATION

> 18.1 In the event that any difference arising between any Contractor and any of the employees, or any difference between the Zone Association, or any Contractor and the Union or between the Zone Association and a Contractor, as to the interpretation, application, administration or alleged violation of this Agreement, including any question as to whether a matter is arbitrable, shall not have been satisfactorily settled by the Board under the provisions of Article 17 – Grievance Procedure – hereof, the matter may be referred to by the Zone Association, any Contractor or Union to arbitration for the final binding settlement as hereinafter provided, by notice in writing given to the other party within fourteen (14) regular working days from the submission of the matter in writing to the Board.
>
> 18.5 No matter may be submitted to arbitration which has not been properly carried through the proper steps of the Grievance Procedure.
>
> 18.6 The Arbitration Board shall not be authorized to make any decision inconsistent with the provisions of this Agreement, nor to alter, modify nor amend any part of this Agreement.

[21] It was common ground that, because the grievance had not been referred to the "Board," and because the 14-day time limit had not been extended by mutual agreement of the parties in writing, the 14-day time limit in Article 17.2 was the applicable time limit. But the Vice-Chair rejected the School Board's submission that the time limit for referral of the grievance to arbitration in Article 17.2 was mandatory and that, if it were not complied with, as in this case, it gave an arbitrator no jurisdiction to hear the matter.

[22] In deciding that he had the authority to hear the July 27, 2004 grievance, the Vice-Chair concluded that in the Collective Agreement the arbitration process is entirely separate from that of the grievance procedure, and that, as a consequence of that finding, the 14-day time limits in Article 17.2 and in Article 18.1 were directory only, not mandatory. Thus, according to the Vice-Chair, he had the discretion to extend the time for the referral to arbitration if he considered it appropriate to do so.

[23] Alternatively, the Vice-Chair found that s. 48(16) of the Act applied to extend the time for referral of the grievance to arbitration. Subsection 48(16) provides in part:

> [A]n arbitrator or arbitration board may extend the time for the taking of any step in the grievance procedure under a collective agreement, despite the expiration of the time, where the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension.

[24] Finally, the Vice-Chair determined, in the further alternative, that even if the grievance had been referred to the Labour Board outside the time limits set out in the Collective Agreement, and even if the time limits were mandatory, he had the authority under s. 133 of the Act to hear the Union's grievance.

[25] In May 2010, the Vice-Chair heard the grievance on its merits. He rejected the School Board's only defence – the argument that the Union was estopped from relying on the strict terms of the Collective Agreement – declared that the School Board had breached the Collective Agreement when it let certain construction contracts to non-union contractors, and ordered an assessment of damages.

(ii) Divisional Court's Decision

[26] The Divisional Court focused all, or virtually all, of its attention on the Labour Board's Jurisdiction Decision, noting first and correctly that the applicable standard of review of that Decision, as well as of the Arbitration Decision, was one of reasonableness.

[27] The court began its analysis with a careful reading of Articles 17 and 18 of the Collective Agreement. It noted, at para. 52, that:

> [a] fundamental principle of both contract and labour law is that the terms of the governing collective agreement must be interpreted in accordance with the plain meaning of its words, and that the intention of the parties reflected in the words of the collective agreement is to be respected.

[28] The Divisional Court concluded that, on their plain meaning, the words of Article 17.2 provide a mandatory timeline for referral of a grievance to arbitration at the Labour Board. The court added, at para. 56:

> Specifically, we are persuaded by the inclusion of the words "but not later" and the reference to "extension by mutual written agreement of the parties", which indicate that the parties contemplated the issue of the extension, and agreed that timelines could not be extended without written agreement.

[29] The Divisional Court thus obviously disagreed with the Vice-Chair's reasoning or conclusion that the timelines for referral to arbitration under the Collective Agreement are discretionary. The court observed, at para. 59, that "there are clear consequences specified in the collective agreement if the timelines are not met. When the grievance timelines expired, there was nothing to refer to arbitration, and the OLRB had no jurisdiction to proceed."

[30] The Divisional Court took special note of the meaning and effect of Articles 17.3 and 18.5 of the Collective Agreement. Article 17.3 provides that "any grievance … that has not been carried through Article 17 – Grievance Procedure Clauses and in accordance with the time limit specified, or mutually agreed to, *will be deemed to have been settled satisfactorily by the parties to the grievance*" (emphasis added). Article 18.5 confirms that "*No matter may be submitted to arbitration which has not been properly carried through the proper steps of the Grievance Procedure*" (emphasis added). According to the Divisional Court, the only reasonable, rational conclusion to be drawn from Article 17.3, even on the OLRB's own jurisprudence, including, for example, its decision in *Centro Masonry Ltd.*, [1997] O.L.R.D. No. 2267, is that, once the clause is engaged, it "brings the grievance and the referral to arbitration to an end through a deemed settlement. … there is nothing left that could be referred to arbitration."

[31] Regarding s. 133 of the Act, the Divisional Court concluded, at para. 92, that the interpretation given to it by the Vice-Chair was unreasonable for the following reasons:

> • The interpretation gives the Board the power to extend timelines but an interpretation giving the Board the power to extend timelines undermines the intended purpose of referring arbitration matters in construction grievances directly to the Board, namely speedy resolution of disputes.
>
> • Established interpretations in prior cases confirm that section 133 of the OLRA allows timelines to be truncated not extended.
>
> • The Vice-Chair's interpretation of section 133 creates a two-tiered system of arbitration with different sets of rules for arbitration – one with strict time lines that apply for consensual arbitration proceeding in accordance with the collective agreement and another with broad powers to extend timelines when the parties pursue arbitration before the OLRB.
>
> • A regime of broad unfettered discretion available to the Board sitting as arbitrator creates uncertainty for both unions and employers in time-sensitive situations.

[32] In summing up, the Divisional Court alluded to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190 and remarked that "reviewing a decision for reasonableness requires the court to inquire into both to the process of articulating the reasons and to outcomes, to determine whether the qualities of justification, transparency and intelligibility are present" [*sic*]. The Divisional Court held that "although the Board is entitled to deference, the various components of the Jurisdiction Decision do not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (at para. 120). In the panel's view, "the OLRB had no jurisdiction to hear the grievance on any basis." The Divisional Court therefore quashed the Jurisdiction Decision, and, in light of its reasons for quashing the Jurisdiction Decision, it also quashed the Arbitration Decision without any further analysis of the reasonableness of that latter decision.

D. ISSUES AND PARTIES' SUBMISSIONS

[33] The Union raises two issues on appeal: First, did the Divisional Court effectively apply a correctness standard of review? Second, did the Divisional Court err in concluding that the Vice-Chair's decisions were unreasonable?

[34] The Union submits that the Divisional Court improperly applied the reasonableness standard by determining that there was only one correct interpretation of s. 133 of the Act, and by substituting its view of "good public policy" for that of the Labour Board.

[35] The Union further submits that the Divisional Court erred in finding the Vice-Chair's decision to be unreasonable. The Union points to s. 133(1), which provides that a grievance under a collective agreement may be referred to the Labour Board "despite the grievance and arbitration provisions in a collective agreement." The Union also highlights s. 133(2), which states that a "referral … may be made *at any time* after the grievance has been delivered to the other party" (emphasis added). So, too, the Union relies upon s. 133(4), which provides the Labour Board with statutory discretion to refuse to accept a referral, and s. 133(9), which grants the Labour Board "exclusive jurisdiction" to determine the grievance.

[36] The Divisional Court erred, the Union says, in failing to explain how s. 133 could be read to entrench the Collective Agreement's time limits over the statutory time limit.

[37] In the Union's submission, the Divisional Court also erred in determining that the expeditious resolution of construction-industry grievances was the only policy animating s. 133 of the Act and that there should not be a two-tiered system of arbitration.

[38] In short, the Union contends the Divisional Court erred in concluding that the Labour Board's jurisdiction decision was unreasonable.

[39] The Universal Workers Union Local 183 Labourers' International Union of North America (the "Intervener") supports the Union's position that the Divisional Court erred in applying the reasonableness standard and erred in finding the decision to be unreasonable.

[40] While the Labour Board takes no position on the reasonableness of the Vice-Chair's decision, it submits that the Divisional Court erred in applying the reasonableness standard and that, in fact, it applied a correctness standard.

[41] The respondent School Board submits that the Divisional Court made no error. According to the School Board, the Divisional Court properly applied the reasonableness standard before concluding, at para. 120 of its Reasons for Judgment, that the OLRB's decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[42] In the School Board's view, the Divisional Court was correct to find that the Vice-Chair acted unreasonably when he decided that he had the authority pursuant to s. 133 to refer to arbitration a grievance that under the clear terms of the Collective Agreement could not be referred to arbitration. The School Board argues that, for s. 133 to apply, there must be a live grievance as of the date of referral. In this case, given the terms of the Collective Agreement, there was no grievance to refer to arbitration.

[43] The School Board further submits that the Divisional Court was alive to the fact that the Labour Board's interpretation of s. 133 effectively undermined the policy or purpose informing the provision: direct referral to the OLRB of construction-industry grievances, for the sake of their speedy resolution. In

the School Board's submission, s. 133 merely provides parties to a collective agreement in the construction industry with another forum in which to arbitrate a grievance. The section does not cloak the Labour Board with any special warrant that may be used to override the bargained-for terms of the parties' Collective Agreement. Section 133, indeed, is nothing without the Collective Agreement, so it cannot provide the OLRB with jurisdiction to resuscitate a dead grievance, a grievance settled or deemed to be settled, and then to extend the time for the referral of the settled grievance to arbitration.

[44] The School Board notes that s. 133(9) of the Act expressly incorporates s. 48(16) of the Act, and it argues, in concert with the conclusion reached by the three-member panel in *Ontario Power Generation*, [2003] O.L.R.D. No. 1835, that if s. 133(1) meant that time limits are irrelevant, there would be no need to incorporate s. 48(16) into s. 133(9).

[45] In summary, the School Board contends that s. 133 does not provide the OLRB with "superpowers," does not operate to eliminate or extend indefinitely any time limit in the collective agreement, and may not be used by the Labour Board to override or ignore the terms of this Collective Agreement.

E. ANALYSIS

[46] The parties agree that the Divisional Court articulated the appropriate standard of review. However, as I have said, the Union, the Labour Board and the Intervener contend that the Divisional Court erred in applying the reasonableness standard.

[47] In my view, some of the language used by the Divisional Court in its reasons is inappropriate when the court is performing a reasonableness analysis. To the extent that the language of the decision may suggest that the Divisional Court applied the correctness standard, rather than merely determining whether the Vice-Chair's decision-making process was reasonable, transparent, justifiable, or within a range of acceptable outcomes, the court erred. The first sentence of para. 106 of the Reasons for Judgment illustrates the problem. There, the Divisional Court writes: "We conclude that s. 133 *should be interpreted* as simply providing the OLRB with jurisdiction to deal with referrals to arbitration according to the rules that apply to arbitrators appointed by the parties pursuant to the collective agreement." [Emphasis added.]

[48] However, while I do not embrace all of the Divisional Court's analysis, I agree without reservation with its ultimate conclusion that the Vice-Chair's Jurisdiction Decision is unreasonable and cannot stand.

[49] The question at the heart of this appeal, and the question with which the Divisional Court was fully engaged, is whether the Vice-Chair's interpretation and application of s. 133 of the Act was reasonable in the circumstances of this case.

[50] Context is everything. As the Supreme Court of Canada observed in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII), 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, citing Elmer Dreidger, *Construction of Statutes* (Toronto: Butterworths, 1983) at 87, "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

[51] In this case, the exercise in statutory interpretation thus begins with the words of the relevant provision. Section 133 provides in part as follows:

> 133.(1) *Despite the grievance and arbitration provisions in a collective agreement* or deemed to be included in a collective agreement under section 48, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions *may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable*, to the Board for final and binding determination.
>
> 133.(2) A referral under subsection (1) shall be in writing in the prescribed form and *may be made at any time after the written grievance has been delivered* to the other party.
>
> 133.(4) The Board may refuse to accept a referral.
>
> 133.(5) In deciding whether or not to accept a referral, the Board is not required to hold a hearing and may appoint a labour relations officer to inquire into the referral and report to the Board.
>
> 133.(6) If the Board accepts the referral, the Board shall appoint a date for and hold a hearing within 14 days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.
>
> 133.(9) If the Board accepts the referral, the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and subsections 48(10) and (12) to (20) apply with necessary modifications to the Board and to the enforcement of the decision of the Board. [Emphasis added.]

[52] The Vice-Chair set out his interpretation of s. 133 at paras. 56 to 64 of his Jurisdiction Decision. He noted that s. 133 (1) contains very broad language, and then, at paras. 59 and 60, he provided the following short statutory history of the section:

> Both what are now sections 133(1) and (9) and subsection 48(16) were added to the Act in 1975, S.O. 1975, c. 1. Aside from changing the word "notwithstanding" to "despite" and the section numbers referred to in subsection 133(9), there was only one substantive amendment to either section. In 1995 (S.O. 1995, c.1, Schedule A), section 48(16) was amended to remove the words "or arbitration procedure". However, virtually the same words were not removed from subsection 133(1). Both the arbitrators and the panels of the the Divisional Court in *Leisureworld* and *James Bay* decisions placed great emphasis on the fact that subsection 48 (16) had been amended to delete the words "and arbitration procedure" to draw the distinction between extending the time for performing acts under the Grievance Procedure as opposed to referring the matter to arbitration.

> Not only was the language not changed in subsection 133(1), the Legislature revisited the issue in 1998 and added what are now subsections 133(4), (5) and (6) giving the Board even greater discretion to deal with grievances referred to it and leaving section 133(1) untouched. It appears then that the Act has moved in different directions for arbitrators acting under section 48 and the Board acting as arbitrator under section 133. Given the nature of the construction industry, discussed below, this makes good labour relations sense.

[53] The Vice-Chair concluded, at para. 61, that the grievance and arbitration provisions in a collective agreement:

> include the time limits, be they mandatory or directory. To make subsection 133(1) subject to those time limits would be to add words to the subsection that are clearly inconsistent with the opening phrase. The discretion of the Board to deny a grievance on the basis of delay is found … in subsection 133(4).

[54] According to the Vice-Chair, the Labour Board as arbitrator is given a broader unfettered jurisdiction under s. 133 than that afforded to arbitrators under s. 48 because, as he put it, at para. 62, the Labour Board "needs the flexibility to be able to consider all of the issues that may arise and that are connected in real and practical terms [in the construction industry] that do not always fit neatly within the general provisions of the Act."

[55] The Vice-Chair acknowledged, at para. 63, that there are OLRB decisions directly contrary to the interpretation he arrived at in this case. One of those decisions, *Ontario Power Generation*, was a unanimous decision of a three-person panel of the Board of which he was the Chair. In that case, the panel concluded, at para. 14, as follows:

> If a grievance were referred to arbitration one day after it was filed with the Employer, the Board would not likely reject it as premature, despite the terms of the grievance process in the Collective Agreement (see ARLINGTON CRANE SERVICES LIMITED, [1986] OLRB Rep. Bpr.417). It may override the choice of forum for arbitration contained in the Collective Agreement (e.g. KENNEDY MASONRY LTD., [1998] OLRB Rep. Aug. 622). That does not mean the reverse is true. Section 133(9) incorporates, among other sections, section 48(16). If section 133(1) meant that time limits are irrelevant, then there would be no need to incorporate section 48(16) … We conclude that section 133 does not operate to eliminate or extend indefinitely any time limit in a collective agreement.

[56] In *Centro Masonry*, a different Vice-Chair of the Board was called upon to decide essentially the same issue as in this case: the question of the referability of a grievance in the construction industry pursuant to s. 133. In that case, one of the relevant provisions of the collective agreement dealing with grievance and arbitration procedures was the following:

> 5.08(c) If advantage of the provisions of Articles 4 and 5 is not taken within the time limits specified therein or as extended in writing, as set out above, the grievance shall be deemed to have been abandoned and may not be re-opened.

[57] The Vice-Chair in *Centro Masonry* observed that through the use of the term "shall" in Article 5.08 (c) the parties clearly "intended that grievances which were not processed in a timely fashion were to be deemed to be abandoned and not re-opened" (at para. 21). In *Centro Masonry*, in other words, the Vice-Chair found that a grievance not processed through the grievance procedure as contemplated by the relevant provisions of the collective agreement, and not referred to arbitration in accord with the time limits set out in the collective agreement, was deemed to be abandoned. At that point, the grievance ceased to exist in any form and was not therefore capable of referral to arbitration.

[58] However, in this case, the Vice-Chair declined to follow this line of authority, and, in short, construed s. 133 as investing the Labour Board with the wide-open discretion to ignore or override the Collective Agreement. Thus, according to the Vice-Chair, the Labour Board has the authority to deal with any matters it likes, including past grievances deemed to have been settled under the Collective Agreement.

[59] In my view, the Divisional Court was correct to find that such an interpretation of s. 133 is unreasonable. The Labour Board has broad discretion to accept or to refuse accept a grievance for referral, but there can be nothing to accept or refuse if there is no grievance. The grievance is the *sine qua non*.

[60] In this case, there was no live grievance at the time of the referral under the relevant terms of the Collective Agreement. There is nothing ambiguous about the meaning and intent of Articles 17.2, 17.3, 18.1, 18.5, and 18.6. The simple fact is that the July 2004 grievance, as amended, was referred to the Labour Board well beyond the 14-day time limit in the Collective Agreement when it was already deemed by the clear language of 17.3 to have been settled by the parties to the Collective Agreement.

[61] To interpret in s. 133(1) the words "despite the grievance and arbitration provisions in the collective agreement" as somehow giving the Labour Board the authority to decide whether any matter is arbitrable, even a grievance that no longer exists, is to read that phrase in isolation without consideration of the function of s. 133 as a whole. Indeed, it was open to the Legislature to craft a very different s. 133(1), one that might have included language such as the following: "… may refer a grievance, including a grievance already adjudicated, settled, deemed to be settled, or abandoned."

[62] The point I wish to emphasize is that s. 133 requires "a grievance". It is only a grievance that animates the section and makes it meaningful. Section 133 provides a useful forum for the prompt resolution of construction industry grievances, a forum not available for grievances outside of the construction industry, but if there is no grievance, then the section is not engaged. In this regard, the view of the Vice-Chair in *Centro Masonry*, as expressed at para. 33, is most apt:

> In my view, the correct interpretation of section 133(2) is to permit the Board to accept a referral at any time while the matter constitutes a "grievance" as defined by the collective agreement. This is consistent with the language of section 133(1) which uses the category "grievance", to describe the thing which is referred under that section. While the matter is still considered "alive" for purposes of the

> collective agreement, it can be brought to the Board without exhausting the grievance procedure. This is why the process is considered to be an expedited one. Once the matter however is deemed to be abandoned, it no longer exists as a "grievance". At this point, according to the agreement there is nothing left to be referred "at any time". Without an extant "grievance", the Board has nothing with which to proceed.

[63] In this case, the position of the Vice-Chair and the Union, if correct, would mean that s. 133 casts upon the Labour Board the right to ignore the express terms of the Collective Agreement dealing with grievance and arbitration, including applicable time lines.

[64] In my view, that cannot be so. Subsection 133(9) expressly incorporates s. 48(16) which provides as follows:

> 48.(16) Except where a collective agreement states that this subsection does not apply, an arbitrator or arbitration board may extend the time *for the taking of any step in the grievance procedure under a collective agreement,* despite the expiration of the time, where the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension. [Emphasis added.]

[65] In the context of this case, the emphasis in s. 48(16) should fall upon the words "for the taking of any step *in the grievance procedure under a collective agreement*." The provision permits an arbitrator to extend the time for the taking of any step *in the grievance procedure under a collective agreement*, as opposed to any step in an arbitration procedure: *Service Employees International Union, Local 204 v. Leisureworld Nursing Homes Inc.* (February 28, 1996) (Arb.), aff'd reflex, (1997), 99 O.A.C. 196 (Div. Ct.), aff'd [1997] O.J. No. 4815 (C.A.). And, as I noted earlier in addressing the OLRB's decision the *Ontario Power Generation* decision, "[i]f section 133(1) meant that time limits are irrelevant, then there would be no need to incorporate 48(16)" (at para. 14).

[66] In my view, therefore, the Vice-Chair's interpretation falls outside the range of acceptable outcomes, because he concluded that he had the authority to refer to arbitration and to decide a grievance when there was in fact no grievance. His interpretation pays little or no heed to, trivializes, and renders inconsequential the mandatory timelines agreed upon by the parties to the Collective Agreement.

[67] The Labour Board has no inherent jurisdiction. Expert as it may be in the understanding and application of its empowering statute, it possesses only the powers delegated to it by its statute, and by the collective agreement. Thus, when the Labour Board sits as arbitrator under s. 133 it must respect, not ignore, the language of the collective agreement. Section 133 cannot reasonably be interpreted to mean that the OLRB may in its own unfettered discretion revive a dead grievance by extending the parties' agreed-upon time limits for referral to arbitration.

[68] For these reasons, I conclude that the Divisional Court was correct in finding that the Labour Board's Jurisdiction Decision was unreasonable, and I would dismiss the appeal.

[69] The parties have agreed on the issue of costs.

CASE LISTINGS JUNE 2012

		PAGE
1.	Applications for Certification	185
2.	Applications for Declaration of Related Employer	199
3.	Sale of a Business	200
4.	Union Successor Rights (Successor Status)	200
5.	Applications for Declaration Terminating Bargaining Rights	201
6.	Complaints of Unfair Labour Practice	202
7.	Applications for Interim Order	204
8.	Application for Consent to Early Termination of Collective Agreement	205
9.	Financial Statement	205
10.	Jurisdictional Disputes	205
11.	Complaints under the Occupational Health and Safety Act	205
12.	Complaints under the Environmental Protection Act	206
13.	Construction Industry Grievances	206
14.	Appeals – Employment Standards Act	209
15.	Appeals – Occupational Health and Safety Act	213
16.	Last Offer Vote	213
17.	Public Sector Labour Relations Transition Act 1997	213
18.	Referral From Minister (Section 115)	213
19.	Sector Determination (Section 153)	213
20.	Applications for Reconsideration of Board's Decision	213

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 2012

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0659-08-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Alcove Drywall Systems Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Alcove Drywall Systems Inc. inthe industrial, commercial and institutional sector of the construction industry and all painters and painters' apprentices in the employ of Alcove Drywall Systems Inc. in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township) and the County of Wellington, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (18 employees in unit)

0883-11-R: Labourers' International Union of North America, Local 625 (Applicant) v. Ingratta Cement and Drainage Contractors Inc. (Respondent)

Unit: "all construction labourers in the employ of Ingratta Cement and Drainage Contractors Inc. in the industrial, commercial and institutional sector of the construction industry and all construction labourers in the employ of Ingratta Cement and Drainage Contractors Inc. in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3679-11-R: Labourers' International Union of North America, Local 625 (Applicant) v. Front Construction Industries Inc. (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 494 (Intervener)

Unit: "all construction labourers, carpenters and carpenters' apprentices in the employ of the responding party in Board Area 1, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman and persons covered by the subsisting collective agreement between the responding party and the United Brotherhood of Carpenters and Joiners of America, Local 494 effective November 7, 2007 to April 30, 2012" (9 employees in unit)

0330-12-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Branthaven Homes 2000 Inc. (Respondent)

Unit: "all construction labourers in the employ of Branthaven Homes 2000 Inc. in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

0334-12-R: Brick and Allied Craft Union of Canada (Applicant) v. 1690448 Ontario Ltd. o/a PS Masonry & Construction (Respondent)

Unit: "of all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of 1690448 Ontario Ltd. o/a PS Masonry & Construction in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

0496-12-R: Labourers' International Union of North America, Local 625 (Applicant) v. Louis' Power Sewing Ltd. (Respondent)

Unit: "all construction labourers, in the employ of the Louis' Power Sewing Ltd. in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0547-12-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. M & M Drywall Ltd. (Respondent)

Unit: "all painters and painters' apprentices in the employ of M & M Drywall Ltd. in the industrial, commercial and institutional sector of the construction industry. As a clarity note, the Board declares that the bargaining unit includes drywall tapers, all painters and painters' apprentices in the employ of M & M Drywall Ltd. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. (22 employees in unit) (*Clarity*)

0726-12-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 2125069 Ontario Inc. (Respondent)

Unit: "all construction labourers in the employ of 2125069 Ontario Inc. in the industrial, commercial and institutional sector of the construction industry and all construction labourers in the employ of 2125069 Ontario Inc. in all sectors of the construction industry within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, excluding the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working foreperson" (6 employees in unit)

0748-12-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Gemini Group Electrical Systems Inc. (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Gemini Group Electrical Systems Inc. in the industrial, commercial and institutional sector of the construction industry and all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Gemini Group Electrical Systems Inc. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

0827-12-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. 2167553 Ontario Inc. o/a Collingwood Interiors and Acoustics (Respondent)

Unit: "all painters and painters' apprentices in the employ of 2167553 Ontario Inc. o/a Collingwood Interiors and Acoustics in the industrial, commercial and institutional sector of the construction industry and all painters and painters' apprentices in the employ of 2167553 Ontario Inc. o/a Collingwood Interiors and Acoustics in all sectors of the construction industry in the County of Simcoe and the District Municipality of

Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (2 employees in unit)

0875-12-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Lorna Marie Hubert o/a Niagara Traffic Services (Respondent)

Unit: "all construction labourers in the employ of Lorna Marie Hubert o/a Niagara Traffic Services in all sectors of the construction industry in the City of Hamilton, the City of Burlington and that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (2 employees in unit)

0885-12-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. W.H.D. Acoustics Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of W.H.D. Acoustics Inc. in the industrial, commercial and institutional sector of the construction industry and all painters and painters' apprentices in the employ of W.H.D. Acoustics Inc. in all sectors of the construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (4 employees in unit)

0901-12-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Norjohn Contracting and Paving Limited (Respondent)

Unit: "all construction labourers in the employ of Norjohn Contracting and Paving Limited in all sectors of the construction industry in the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

0904-12-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Catalia Development Group Inc. (Respondent)

Unit: "all construction labourers in the employ of Catalia Development Group Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0913-12-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. T.A.K. (Respondent)

Unit: "all construction labourers in the employ of T.A.K. in the industrial, commercial and institutional sector of the construction industry and all construction labourers in the employ of T.A.K. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman AND all carpenters and carpenters' apprentices in the employ of T.A.K. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of

Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

0928-12-R: The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Terrafix Groundworks (Canada) Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Terrafix Groundworks (Canada) Inc. in the industrial, commercial and institutional sector of the construction industry and. all carpenters and carpenters' apprentices in the employ of Terrafix Groundworks (Canada) Inc. in all sectors of the construction industry in the United Counties of Stormont, Dundas and Glengarry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in unit)

0946-12-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Mike Peter Murczek c.o.b. as Murczek Mechanical (Respondent)

Unit: "all plumbers and plumbers' apprentices and all pipefitters and pipefitters' apprentices in the employ of Mike Peter Murczek c.o.b. as Murczek Mechanical in the industrial, commercial and institutional sector of the construction industry and plumbers and plumbers' apprentices and all pipefitters and pipefitters' apprentices in the employ of Mike Peter Murczek c.o.b. as Murczek Mechanical in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman." (3 employees in unit)

Bargaining Agents Certified Subsequent to Vote

2888-11-R: Healthcare, Office and Professional Employees Union, Local 2220, UBCJA (Applicant) v. 1367178 Ontario Inc. carrying on the businesses known as The Chartwell Seniors Housing REIT Long Term Residences, The Westmount, The Woodhaven, The Wynfield, and The Waterford (Respondent) v. Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Intervener)

Unit: "all employees of 1367178 Ontario Inc. c.o.b. as: The Westmount - 200 David Bergey Drive, Kitchener, Ontario; The Wynfield - 451 Woodmount Drive, Oshawa, Ontario; The Woodhaven -380 Church Street, Markham, Ontario; The Waterford 2240 Baronwood Drive, Oakville, Ontario; Save and except supervisors and persons above the rank of supervisor, Nurse Managers, Educator, Co-ordinators, Registered and Graduate Nurses, Recreation Managers, Volunteer Co-ordinator, Maintenance, and office and clerical staff" (880 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	906
Number of persons who cast ballots	473
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	470
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	365
Number of ballots marked in favour of intervener	103
Number of ballots segregated and not counted	3

3978-11-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Bee-Clean Building Maintenance (Respondent)

Unit: "all employees of Bee-Clean Building Maintenance employed at 300 Water Street, Peterborough, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff" (10 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

0440-12-R: Service Employees International Union Local 2, Brewery, General and Professional Workers' Union (Applicant) v. UNICCO Facilities Services Company (Respondent)

Unit: "all employees of UNICCO Facilities Services Company, working in the City of Orillia, save and except supervisors and those above the rank of supervisor" (3 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

0452-12-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Royal Host Limited Partnership c.o.b. as Travelodge Hotel Airlane (Respondent)

Unit: "all employees of Royal Host Limited Partnership c.o.b. as Travelodge Hotel Airlane in the City of Thunder Bay, employed to Service Banquets, save and except Supervisors, Executive Chef, Executive Sous Chef, Pastry Chef, Banquet Chef, Flight Catering Chef, Chef Steward, three (3) Sous Chefs, Maitre d¿ Hotel, Building and Property Supervisor, and persons above those ranks." (29 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	25
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	1

Number of spoiled ballots	0
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	6

0475-12-R: Association of Hebrew School Educators (Applicant) v. Paul Penna Downtown Jewish Day School (Respondent)

Unit: "all teachers in the employ of Paul Penna Downtown Jewish Day School in the City of Toronto, save and except Principal, Vice-Principal and persons above the rank of Vice- Principal, senior administrative staff, psychologists, teaching assistants, administrative staff and office and clerical staff. Clarity Note: Senior administrative staff shall include the Director of Curriculum and Instruction, Business Manger, and Student Services Specialist/Director." (23 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity*)

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

0492-12-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 115161 Canada Inc. o/a The Fashion Distributors, part of the Remco Group of Companies (Respondent)

Unit: "all employees of 115161 Canada Inc. o/a The Fashion Distributors, part of the Remco Group of Companies, employed at 1 Wilkinson Road, Brampton, Ontario, save and except Office and Clerical Staff, Mechanics, IT Staff, Sales Representatives, Supervisors and persons above the rank of Supervisor." (60 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	63
Number of persons who cast ballots	58
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	58
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	39
Number of ballots marked against applicant	17
Number of ballots segregated and not counted	0

0506-12-R: Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. Niagara Support Services (Respondent)

Unit: "all Support Workers of Niagara Support Services employed at the St. David's location, 1046 Line 9 Road, in the city of Niagara- on-the-Lake, save and except the Supervisors and those above the rank of Supervisor." (10 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

0516-12-R: Labourers' International Union of North America, Local 625 (Applicant) v. Louis' Power Sewing Ltd. (Respondent)

Unit: "all employees of Louis' Power Sewing Ltd. working in and out of the Town of Tecumseh, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff." (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

0535-12-R: Ontario Public Service Employees Union (Applicant) v. Hotel-Dieu Grace Hospital (Respondent)

Unit: "all employees of the Hotel-Dieu Grace Hospital in the City of Windsor and the County of Essex employed in its Diagnostic Imaging Services (Nuclear Medicine) save and except supervisors and persons above the rank of supervisor and employees covered by subsisting collective agreements" (20 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

0563-12-R: Ontario Public Service Employees Union (Applicant) v. London Health Sciences Centre (Respondent)

Unit: "All technical personnel employed by the London Health Science Centre (LHSC) in the City of London at University Campus save and except Bio¿medical Technologists, professional medical staff, Graduate Nursing Staff, Undergraduate Nurses, Graduate Pharmacists, Undergraduate Pharmacists, Graduate Dieticians, Student Dieticians, Social Workers, Chief Engineer and Assistant Chief Engineer, Residence Director, Supervisors, Foremen, persons above the rank of Supervisor or Foremen, Office and Clerical Staff, Watchmen, Security Guards, Registered Nursing Assistants, Student Registered Nursing Assistants, Graduate and Undergraduate Speech Therapists, Physiotherapists, Occupational Therapists, Psychologists, Psychometrists, Audiologists, staff with Veterinarian degrees, students engaged in a co-operative program between the Employer and a university or college or high school, Pharmacy Technicians and Medication System Technicians and employees in bargaining units for which any trade union held bargaining rights as of May 22, 2012." (215 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	289
Number of persons who cast ballots	215
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	209
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	118
Number of ballots marked against applicant	54
Number of ballots segregated and not counted	43

0655-12-R: U.F.C.W. Local 333 (Applicant) v. Primary Response Inc. (Respondent)

Unit: "all employees of Primary Response Inc. employed as security guards at 2800 Rutherford Road, Vaughan, Ontario, save and except supervisors and persons above the rank of supervisor." (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

0664-12-R: Service Employees International Union Local 1 Canada (Applicant) v. Vita Community Living and Mens Sana Families for Mental Health (Respondent)

Unit: "all employees of Vita Community Living Services and Mens Sana Families for Mental Health in the City of Toronto and York Region save and except supervisors, persons above the rank of supervisor, therapists, administrative program assistants, and office and clerical staff" (322 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	337
Number of persons who cast ballots	250
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	238

Number of segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	209
Number of ballots marked against applicant	29
Number of ballots segregated and not counted	11

0675-12-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. *vpi* Inc. (Respondent)

Unit: "all employees employed at vpi Inc. in the City of Richmond Hill, save and except managers and persons above the rank of manager." (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

0705-12-R: Ontario Nurses' Association (Applicant) v. White Eagle Long Term Care Residence (Respondent)

Unit: "all Registered Nurses and Registered Nurses with a Temporary Certificate of Registration engaged in a nursing capacity at White Eagle Long Term Care Residence in the City of Toronto, save and except Director of Care and those above the rank of Director of Care" (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	1

0775-12-R: Ontario Nurses' Association (Applicant) v. Watford Quality Care Centre (Respondent)

Unit: "all Registered Nurses and nurses with temporary certificate of registration engaged in a nursing capacity at Watford Quality Care Centre in Watford, Ontario, save and except supervisors and persons above the rank of supervisor." (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

0776-12-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. vpi Inc. (Respondent)

Unit: "all employees employed at vpi Inc. at 3443 Finch Avenue, East, Scarborough, save and except Managers and persons above the rank of Manager." (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

0793-12-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Castonguay Blasting Ltd. (Respondent)

Unit: "all drillers and surface blasters in the employ of Castonguay Blasting Ltd. in the Province of Ontario, save and except supervisors and persons above the rank of supervisor" (30 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity*)

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	1

0801-12-R: University of Ontario Institute of Technology Faculty Association (Applicant) v. University of Ontario Institute of Technology (Respondent)

Unit: "all Teaching Faculty employed by the University of Ontario Institute of Technology in the City of Oshawa, save and except: i. Associate Deans and Associate Provosts, and those above the level of Associate Dean or Associate Provost; ii. Employees who are members of another bargaining unit; iii. Employees who are hired on a definite term appointment; iv. Post Doctoral Fellows; v.Research Associates; vi. Emeritus Professors; vii. Librarians; viii. Visiting Professors; ix. Directors of the Automotive Centre of Excellence; and x.Members of the Board of Governors." (38 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	30
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	29
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	1

0804-12-R: Service Employees International Union Local 2, Brewery, General and Professional Workers' Union (Applicant) v. UNICCO Facilities Services Canada Company (Respondent)

Unit: "all employees of UNICCO Facility Services Canada Company, working at 4180 Duke of York Blvd. Mississauga, save and except supervisors and those above the rank of supervisor." (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

0834-12-R: International Association of Machinists and Aerospace Workers (Applicant) v. Health Trans Services Inc. (Respondent)

Unit: "all employees of Health Trans Services Inc. working as drivers in the City of Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff." (12 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0

Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	1

0835-12-R: Service Employees International Union Local 2 Brewery, General and Professional Workers' Union (Applicant) v. NASCO Entretien menager d'immeubles inc./NASCO Building Cleaning Inc. (Respondent)

Unit: "all employees of NASCO Entretien ménager d'immeubles inc./ NASCO Building Cleaning Inc. who work at La Cité Collégiale in the City of Ottawa save and except for supervisors and those above the rank of supervisors tous les employés et employées de NASCO Entretien ménager d'immeubles inc./NASCO Building Cleaning Inc. qui travaillent à la Cité Collégiale dans la Ville d'Ottawa à l'exception des superviseurs et des personnes au-dessus du rang de superviseurs" (25 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	24
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	24
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

0857-12-R: Ontario Public Service Employees Union (Applicant) v. Trellis Mental Health and Developmental Services (Respondent)

Unit: "all employees employed by Trellis Mental Health and Developmental Services in the Regional Municipality of Waterloo and the Counties of Wellington and Dufferin save and except supervisors, persons above the rank of supervisor, persons employed in a confidential capacity in matters relating to labour relations, members of the medical profession entitled to practice in Ontario and employed in a professional capacity, Special Services at Home staff, Supporting Kids in Camp Counselors and Students employed during the school vacation period" (169 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	161
Number of persons who cast ballots	145
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	138
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	87
Number of ballots marked against applicant	57
Number of ballots segregated and not counted	1

0862-12-R: Syndicat Canadien de la Fonction Publique (Applicant) v. Garderie LaJoie de North York Inc. (Respondent)

Unit: "all employees of Garderie LaJoie de North York Inc. in the City of Toronto, Ontario except supervisors and those above the rank of supervisor tous les employés de la Garderie LaJoie de North York

Inc. dans la Ville de Toronto, Ontario à l¿exception des superviseurs et des personnes au-dessus du rang de superviseurs" (13 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	1

Applications for Certification Dismissed Without Vote

0803-12-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Emery Homes Waterloo Limited (Respondent) v. Allied Construction Employees Local 1030, United Brotherhood of Carpenters and Joiners of America (Intervener)

0826-12-R: The International Union of Painters and Allied Trades, Local Union 1891, (Applicant) v. Robert Pritchard c.o.b. as Barrie Drywall, (Respondent)

Applications for Certification Dismissed Subsequent to Vote

4043-11-R: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. Big Red Market (Distribution/Warehouse) (Respondent)

Unit: "all employees employed by Big Red Market (Distribution/Warehouse) located at 133 Front Street in the City of Thorold, Ontario, save and except supervisors, all those above the rank of supervisor, administration and office staff." (28 employees in unit)

0542-12-R: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. Courtyard by Marriott Mississauga Airport Corporate Centre West (Respondent)

Unit: "all employees employed by the Courtyard Marriott Mississauga located at 5050 Creekbank Road, in the City of Mississauga, Ontario, save and except Supervisors, all those above the rank of Supervisor, Administration, Night Audit, Sales Staff, and Students" (26 employees in unit)

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	25
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	16
Number of ballots segregated and not counted	2

0593-12-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Inter-Global Mechanical Services Inc. (Respondent)

Unit: "all employees of Inter-Global Mechanical Services Inc. engaged in service and maintenance of plumbing, pipefitting and drain systems in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, office, clerical and sales staff." (7 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

0608-12-R: Labourers' International Union of North America, Local 1059 (Applicant) v. OMNI Facility Services Canada Corp. (Respondent)

Unit: "all employees of OMNI Facility Services Canada Corp. engaged in cleaning and building services employed at 601 Dundas St., in the City of London, Ontario, save and except supervisors, persons above the rank of supervisor and office staff" (12 employees in unit)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	10
Number of ballots segregated and not counted	0

Applications for Certification Withdrawn

1139-11-R: Allied Construction Employees Local 1030, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Emery Homes and/or Emery Homes Burlington Limited (Respondent)

2165-11-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. 180 University Management Inc. and/or, Westbank Projects Corp. and/or, Peterson Investment Group Inc. and, Peterson Investment (Spruceland) Ltd. (Respondent)

3660-11-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. 578898 Ontario Limited carrying on business as Alpine Roofing (Respondent)

3758-11-R: Canadian Council of Construction Unions (Applicant) v. Urbancorp (Respondent)

0240-12-R: Labourers' International Union Of North America, Ontario Provincial District Council (Applicant) v. L & M Haulage Inc. (Respondent)

0251-12-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Viva Retirement Communities Inc. (Respondent)

0524-12-R: The Building Union of Canada (BUC) (Applicant) v. 1389506 Ontario Inc. c.o.b. as Areia Concrete (Respondent) v. Universal Workers Union, Labourers' International Union of North America Local 183 (Intervener)

0560-12-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. CSR Building Supplies Ltd. (Respondent)

0613-12-R: Service Employees International Union Local 1 Canada (Applicant) v. Summit Housing and Outreach Programs (Respondent)

0624-12-R: International Union of Operating Engineers, Local 793 (Applicant) v. Cambridge Concrete Pumping Inc. (Respondent) v. Christian Labour Association of Canada (CLAC) (Intervener)

0670-12-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. City Plumbing Mechanics Ltd. (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2988-09-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ariss Construction Inc. and, Stahle Construction Inc. (Respondent) *(Dismissed)*

0677-10-R: United Brotherhood of Carpenters and Joiners of America, Local 27 (Applicant) v. English Prestige Project Management Inc. and, English Prestige General Contracting Inc. (Respondent) *(Dismissed)*

1361-10-R: Labourers' International Union of North America, Local 1089 (Applicant) v. Seal-On Paving Ltd. and, Arnill Developments Limited and, Seeley and Arnill Construction Limited (Respondent) v. Labourers' International Union of North America, Local 625, Labourers' International Union of North America, Local 1059 (Intervener) *(Withdrawn)*

2789-10-R: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Canadian Ramp Company Inc. and, Hardcore Skate Parks Inc., (Respondent) *(Withdrawn)*

2830-10-R: Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. The Ron Boyko Group Inc. o/a RBG Inc., RBG Environmental Inc. (Respondent) *(Granted)*

1696-11-R: IBEW Electrical Power Council of Ontario and International Brotherhood of Electrical Workers, Local 894 (Applicant) v. Crossby Dewar Inc. and, Murray's Electrical & Mechanical Contractors Corporation (Respondent) v. Canadian Union of Skilled Workers and, Electrical Power Systems Construction Association (Intervener) *(Dismissed)*

3133-11-R: International Brotherhood of Electrical Workers, Local Union 1687 (Applicant) v. Luc Charles Electrical, Advance Heating & Air Conditioning Inc. also c.b.a. Advance Heating Air Conditioning Electrical Energy Solutions (Respondent) *(Withdrawn)*

0144-12-R: International Union of Painters and Allied Trades Local 1891 (Applicant) v. Tri-County Interiors Inc. and, Bernie Klaus Duewel, a sole proprietor, c.o.b. as BKD Interiors and, Middlesex Drywall Limited and/or, Niekohr Holdings Inc. (Respondent) *(Granted)*

0318-12-R: Labourers' International Union Of North America, Ontario Provincial District Council (Applicant) v. A-1 Asphalt Maintenance Ltd., L & M Haulage Inc. (Respondent) *(Withdrawn)*

SALE OF A BUSINESS

2988-09-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ariss Construction Inc. and, Stahle Construction Inc. (Respondent) *(Dismissed)*

1361-10-R: Labourers' International Union of North America, Local 1089 (Applicant) v. Seal-On Paving Ltd. and, Arnill Developments Limited and, Seeley and Arnill Construction Limited (Respondent) v. Labourers' International Union of North America, Local 625, Labourers' International Union of North America, Local 1059 (Intervener) *(Withdrawn)*

2789-10-R: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Canadian Ramp Company Inc. and, Hardcore Skate Parks Inc., (Respondent) *(Withdrawn)*

1696-11-R: IBEW Electrical Power Council of Ontario and International Brotherhood of Electrical Workers, Local 894 (Applicant) v. Crossby Dewar Inc. and, Murray's Electrical & Mechanical Contractors Corporation (Respondent) v. Canadian Union of Skilled Workers and, Electrical Power Systems Construction Association (Intervener) *(Dismissed)*

3133-11-R: International Brotherhood of Electrical Workers, Local Union 1687 (Applicant) v. Luc Charles Electrical, Advance Heating & Air Conditioning Inc. also c.b.a. Advance Heating Air Conditioning Electrical Energy Solutions (Respondent) *(Withdrawn)*

0144-12-R: International Union of Painters and Allied Trades Local 1891 (Applicant) v. Tri-County Interiors Inc. and, Bernie Klaus Duewel, a sole proprietor, c.o.b. as BKD Interiors and, Middlesex Drywall Limited and/or, Niekohr Holdings Inc. (Respondent) *(Granted)*

0318-12-R: Labourers' International Union Of North America, Ontario Provincial District Council (Applicant) v. A-1 Asphalt Maintenance Ltd., L & M Haulage Inc. (Respondent) *(Withdrawn)*

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

4020-11-R: Labourers' International Union of North America, Local 837 (Applicant) v. Labourers' International Union of North America, Local 506, Imperial Precast Corp. (Respondent) *(Granted)*

Unit: "all employees of Imperial Precast Corp. in Stoney Creek, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical, sales staff and truck drivers" (5 employees in unit)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2992-10-R: Derek Seguin, (Applicant) v. Labourers' International Union of North America, Local 493 (Respondent) v. Labelle Brothers Construction and/or Labelle Brother Ltd., 763535 Ontario Inc. o/a Labelle Brothers Excavating (Intervener) *(Withdrawn)*

0442-12-R: Mirelys Emilia Roelcke (Applicant) v. Retail, Wholesale and Department Store Union, District Council c/o workers at 2300600 Ontario Inc. Super 8 North Bay (Respondent) v. 2300600 Ont Inc (Intervener) *(Granted)*

Unit: "all employees of 2150149 Ontario Inc. c.o.b. as Super 8 North Bay, Ontario save and except Managers and persons above the rank of Managers" (6 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	6
Number of ballots segregated and not counted	0

0757-12-R: Lucas Silveira Madeline Beke Martina Plokhaar (Applicant) v. Service Employees International Union Local 1 Canada (Respondent) v. Baybridge (London) Inc. (Intervener) *(Dismissed)*

Unit: "The Employer recognizes the Union as the sole and exclusive bargaining agent for all of the Employees of the Employer at Masonville Manor located at 350 North Centre Road in the City of London, Ontario, save and except supervisors, persons above the rank of supervisor." (32 employees in unit)

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	25
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	24
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	19
Number of ballots segregated and not counted	1

0771-12-R: Michael Hamilton (Applicant) v. Labourers International Union of North America, Local 183 (Respondent) v. Drain -Tite Industries Inc. (Intervener) *(Dismissed)*

0950-12-R: Employees of Frontline Cable & Gas (Applicant) v. Labourers' International Union of North America Local 837 (Respondent) v. Front-Line Cable & Gas Services Inc. (Intervener) *(Dismissed)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3174-09-U; **3175-09-U**: International Brotherhood of Electrical Workers, Local 1739 (Applicant) v. International Brotherhood of Electrical Workers, First District, Canada and, Edwin Hill (Respondent) v. International Brotherhood of Electrical Workers, Local 353 (Intervener); International Brotherhood of Electrical Workers, Local 894 (Applicant) v. International Brotherhood of Electrical Workers, First District, Canada and, Edwin Hill (Respondent) v. International Brotherhood of Electrical Workers, Local 353, I.B.E.W. Local 894 Welfare Trust Fund, I.B.E.W. Local 894 Pension Plan Trust Fund (Intervener) *(Granted)*

0232-10-U; **0449-10-U**: Aramark Canada Ltd. (Applicant) v. UNITE HERE and Hospitality & Service Trade Union Local 261 (Respondent); Hospitality & Service Trades Union, Local 261 (Applicant) v. Aramark Canada Ltd. (Respondent) *(Terminated)*

0403-10-U: Labourers' International Union of North America, Local 493 (Applicant) v. Labelle Brothers Construction and/or Labelle Brother Ltd., 763535 Ontario Inc. o/a Labelle Brothers Excavating, Jean-Paul Labelle and, Derek Seguin (Respondent) *(Withdrawn)*

0971-10-U: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and Plumbers Residential Council, Ontario (Applicant) v Alamo Plumbing & Drain Specialists Inc. and Marcello Alaimo (Respondent) *(Terminated)*

2646-10-U: Labourers' International Union of North America, Local 625 (Applicant) v. Winroc, a Division of Superior Plus LP (Respondent) *(Withdrawn)*

0918-11-U: Jonathan Hopkins (Applicant) v. Power Workers' Union (Respondent) v Electrical Safety Authority (Intervener) *(Terminated)*

1457-11-U: Sheet Metal Workers' International Association, Local 51 (Applicant) v. Dominion Sheet Metal & Roofing Works, Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America and/or, Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Respondent) *(Dismissed)*

1699-11-U: IBEW Electrical Power Council of Ontario and International Brotherhood of Electrical Workers, Local 894 (Applicant) v. Crossby Dewar Inc.,, Murray's Electrical & Mechanical Contractors Corporation and, Canadian Union of Skilled Workers (Respondent) v. Electrical Power Systems Construction Association (Intervener) *(Dismissed)*

1902-11-U: Ontario Workers' Union (Applicant) v. William Osler Health System (Respondent) v. Service Employees International Union, Local 1 Canada (Intervener) *(Endorsed Settlement)*

2290-11-U: Annabella Louro (Applicant) v. Canadian Union of Public Employees and its Local 1483 (Respondent) v. Dufferin-Peel Catholic District School Board and Richard Moriah (Intervener) *(Dismissed)*

2321-11-U: Service Employees International Union Local 1 Canada (Applicant) v. Yee Hong Centre for Geriatric Care (Respondent) *(Withdrawn)*

2529-11-U: Ronald J. Sykes (Applicant) v. Canadian Auto Workers Local 222 (Respondent) v. General Motors of Canada Limited (Intervener) *(Dismissed)*

2852-11-U: Nicole Anstey (Applicant) v. Canadian Union of Public Employees and its Local 2936-02 (Respondent) v. Community Living Oshawa/Clarington (Intervener) *(Dismissed)*

2898-11-U: Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. 1367178 Ontario Inc. c.o.b. as: The Westmount - 200 David Bergey Drive, Kitchener, Ontario; The Wynfield - 451 Woodmount Drive, Oshawa, Ontario; The Woodhaven - 380 Church Street, Markham, Ontario; The Waterford - 2240 Baronwood Drive, Oakville, Ontario (Respondent) v. Healthcare, Office and Professional Employees Union, Local 2220, UBCJA (Intervener) *(Withdrawn)*

3085-11-U: Nuria Abdosh (Applicant) v. Ontario Nurses' Association (Respondent) *(Dismissed)*

3138-11-U: Trevor Kidd (Applicant) v. National Automobile, Areospace, Transportation and General Workers Union of Canada (CAW CANADA), Local 2002 (Respondent) *(Dismissed)*

3209-11-U: Brenda Livingston (Applicant) v. United Food & Commercial Workers Canada, Locals 175 & 633 (Respondent) *(Dismissed)*

3371-11-U: Communications, Energy and Paperworkers Union of Canada and its Local 1470 (Applicant) v. Norampac Inc. - Trenton Division (Respondent) *(Withdrawn)*

3496-11-U: Elisabeth Mekonnen (Applicant) v. Workers United Canada Council (Respondent) *(Dismissed)*

3516-11-U: Krystyna Reszkiewicz (Applicant) v. Ontario Public Service Employee's Union Local 152 (Respondent) v. St. Joseph's Health Care, London (Intervener) *(Dismissed)*

3655-11-U: Venerando De Fina (Applicant) v. CUPE Local 1571 (Respondent) *(Withdrawn)*

3673-11-U: Linda Kelly (Applicant) v. CUPE Local 5167 (Respondent) v. Corporation of the City of Hamilton (Intervener) *(Withdrawn)*

3802-11-U: Ontario Workers' Union (Applicant) v. Humber River Regional Hospital (Respondent) *(Withdrawn)*

3909-11-U: Communications, Energy and Paperworkers Union of Canada and its Local 1470 (Applicant) v. Norampac Inc. - Trenton Division (Respondent) *(Withdrawn)*

3949-11-U: Emanuel Abraham (Applicant) v. CUPE - 3621 (Respondent) *(Withdrawn)*

3956-11-U: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Alpine Roofing Ltd. 578898 Ontario Limited c.o.b. as Alpine Roofing (Respondent) *(Withdrawn)*

4036-11-U: Agostino Orfao (Applicant) v. CEP Communications, Energy & Paperworkers Union of Canada (Respondent) *(Withdrawn)*

4040-11-U: Norman Traversy (Applicant) v. Mississauga Professional Fire Fighters Association, Local 1212 (Respondent) *(Dismissed)*

4060-11-U: Labourers' International Union of North America, Local 506 (Applicant) v. Advanced Precast Inc. (Respondent) *(Terminated)*

0020-12-U: Angela Clarke-Henry (Applicant) v. Unite Here Local 75 (Respondent) *(Withdrawn)*

0124-12-U: Ontario Public Service Employees Union ("OPSEU") (Applicant) v. Algonquin College (Respondent) *(Withdrawn)*

0191-12-U: Ontario Workers' Union (Applicant) v. St. Michael's Hospital (Respondent) *(Withdrawn)*

0208-12-U; **0346-12-U**: Communications, Energy and Paperworkers Union of Canada (Applicant) v. City Park Co-Operative Apartments Inc. (Respondent) *(Endorsed Settlement)*

0257-12-U: The Corporation of the County of Norfolk (Applicant) v. Ontario Nurses Association (Respondent) *(Withdrawn)*

0302-12-U: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v.Big Red Market (Distribution/Warehouse) (Respondent) *(Withdrawn)*

0376-12-U: United Food and Commercial Workers International Union (Applicant) v. Burt Transportation Services Ltd. (Respondent) *(Withdrawn)*

0426-12-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Brant Haven Homes 2000 Inc., 244768 Ontario Limited, Branthaven Homes Fruitland Inc., Branthaven Homes Bronte Creek Inc., Branthaven Homes Fairview Inc., Branthaven Casablanca Inc. (Respondent) *(Terminated)*

0523-12-U; **0694-12-U**; **0695-12-U**: The Canadian Union of Postal Workers (Applicant) v. 3119696 Canada Inc., operating as Quick Messenger Service (QMS),, 1118041 Ontario Ltd., operating as Datarush Courier Service,, 2945-8171 Quebec Inc., operating as Stingray Courier Service,, 1120464 Pronto Courier Service (1995) Ltd., operating as Pronto Toronto (Respondent) *(Withdrawn)*

0541-12-U: Labourers' International Union of North America, Local 506 (Applicant) v. 2115700 Ontario Inc. c.o.b. as Demtec Demolition (Respondent) *(Granted)*

0549-12-U: Beatriz R. Gonzalez (Applicant) v. SEIU Local 2 Brewery General and Professional Worker's Union (Respondent) v. Compass Group Canada Support Services Ltd. (Intervener) *(Withdrawn)*

0559-12-U: Labourers' International Union of North America, Local 506 (Applicant) v. Otomic Contractors Ltd. (Respondent) *(Granted)*

0631-12-U: International Union of Operating Engineers, Local 793 (Applicant) v. Heavy Construction Association of Windsor (Respondent) *(Withdrawn)*

0796-12-U: Ontario Public Service Employees Union (Applicant) v. Canadian Mental Health Association Thunder Bay Branch (Respondent) *(Withdrawn)*

0840-12-U: Labourers' International Union of North America, Local 247 (Applicant) v. 1248833 Ontario Inc. c.o.b. as Harold's Demolition & Recycling (Respondent) *(Withdrawn)*

0858-12-U: Nassim Eronn (Applicant) v. Sodexo Canada Ltd. (Respondent) *(Terminated)*

0909-12-U: Teamsters Local Union 847, AFL-CIO-CLC (Applicant) v. Whiz-A-Top Services Ltd. (Respondent) *(Withdrawn)*

APPLICATION FOR INTERIM ORDER

0052-12-M: Jane Finch (Applicant) v. Riscon Services Ltd. c.o.b. Garda (Respondent) *(Withdrawn)*

0908-12-M: Teamsters Local Union 847, AFL-CIO-CLC (Applicant) v. Whiz-A-Top Services Ltd. (Respondent) *(Withdrawn)*

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0313-12-M: Toro Aluminum (Applicant) v. United Brotherhood of Retail, Food, Industrial and Service Trades International Union (Respondent) *(Granted)*

0622-12-M: Hospitality Resorts Inc. (Applicant) v. United Food & Commercial Workers, Local 102 (Respondent) *(Granted)*

0692-12-M: Kraus Inc., United Food and Commercial Workers International Union, Local 175 (Applicant) v. (Respondent) *(Granted)*

FINANCIAL STATEMENT

3543-11-M: Claudio Spagnuolo (Applicant) v. Fabio Gazzola President CUPE 831 Brampton (Respondent) *(Dismissed)*

JURISDICTIONAL DISPUTES

2761-07-JD; **2979-07-JD**; **3108-08-JD**; **0845-10-JD**; **0846-10-JD**; **0848-10-JD**; **0860-10-JD**; **2560-10-JD**: The Crown in Right of Ontario as represented by the Ministry of Government and Consumer Services (Applicant) v. Ontario Public Service Employees Union (Respondent) v. The Association of Management, Administrative and Professional Crown Employees of Ontario (AMAPCEO) (Intervener); The Crown in Right of Ontario as represented by the Ministry of Government Services (Applicant) v. Ontario Public Service Employees Union (Respondent) v. The Association of Management, Administrative and Professional Crown Employees of Ontario (AMAPCEO) (Intervener) *(Dismissed)*

0184-08-JD: Construction and Allied Workers Local Union 607, Labourers International Union of North America (Applicant) v. Aluma Systems Canada Inc., United Brotherhood of Carpenters and Joiners of America, Local 1669 (Respondent) v. Electrical Power Systems Construction Association (Intervener) *(Dismissed)*

1373-11-JD: Brick and Allied Craft Union of Canada, Local 31 (Applicant) v. Brick and Allied Craft Union of Canada, Local 2/ International Union of Bricklayers and Allied Craftworkers, Local 2 and, GEM Campbell Terrazzo & Tile Inc. (Respondent) v. Masonry Industry Employers' Council of Ontario/ Ontario Masonry Contractors' Association - BACU Bargaining Committee and, Terrazzo, Tile & Marble Guild of Ontario, Inc. (Intervener) *(Withdrawn)*

3080-11-JD: International Union of Painters and Allied Trades, District Council 46 (Applicant) v. Labourers' International Union of North America, Local 506, Vanbots, A Division of Carillion Construction Inc., Stonhard (Respondent) *(Granted)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

4010-10-OH: Jessica Dannrath (Applicant) v. Northern Beauty Salon (Respondent) *(Withdrawn)*

0697-11-OH: Monica Gerber (Applicant) v. Barter Network Ltd. (Respondent) *(Withdrawn)*

3618-11-OH: Brenda G. Kazenel (Applicant) v. Citi Cards Canada Inc. (Respondent) *(Terminated)*

3926-11-OH: Alain R. Fredette (Applicant) v. Cementation Canada Inc. (Respondent) *(Withdrawn)*

3969-11-OH: Jane Finch (Applicant) v. Garda (Respondent) *(Withdrawn)*

3970-11-OH: Lauren Braun (Applicant) v. Anishinaabe Abinoojii Family Services (Respondent) *(Withdrawn)*

0062-12-OH: Jason D. Yeats (Applicant) v. Chapman's Ice Cream Limited (Respondent) *(Withdrawn)*

0194-12-OH: Joey Moreau (Applicant) v. Passaw Ltd. (Respondent) *(Dismissed)*

0221-12-OH: Jason Cormier (Applicant) v. Pinty's Delicious Foods Ltd. (Respondent) *(Dismissed)*

0236-12-OH: Aneela Rana (Applicant) v. Total Security Management Services Ltd. (Respondent) *(Withdrawn)*

0298-12-OH: Vycky McGinn (Applicant) v. Manoir Wymering Manor Inc. (Respondent) *(Withdrawn)*

0336-12-OH: James Borden (Applicant) v. Goodyear Canada Inc. (Respondent) *(Withdrawn)*

0411-12-OH: Walter Kambulow (Applicant) v. Walmart Supercenter (Respondent) *(Withdrawn)*

0532-12-OH: Kevin Gordon (Applicant) v. Sky Jack Inc. (Respondent) *(Withdrawn)*

0682-12-OH: Lyndon Fawcett (Applicant) v. Clean International (Respondent) v. Olymel Prince Foods (Intervener) *(Dismissed)*

0878-12-OH: Mary Taraborrelli (Applicant) v. First Choice Haircutters (Respondent) *(Dismissed)*

COMPLAINTS UNDER THE ENVIRONMENTAL PROTECTION ACT

0741-12-EP: Gary Mark (Applicant) v. Luminex Corporaton (Respondent) *(Withdrawn)*

CONSTRUCTION INDUSTRY GRIEVANCES

1360-10-G: Labourers' International Union of North America, Local 1089 (Applicant) v. Seal-On Paving Ltd. and, Arnill Developments Limited and, Seeley and Arnill Construction Limited (Respondent) *(Withdrawn)*

1621-10-G: Brick and Allied Craft Union of Canada, Local 2 and International Union of Bricklayers and Allied Craftworkers, Local 2 (Applicant) v. GEM Campbell Terrazzo & Tile Inc. (Respondent) *(Withdrawn)*

3008-11-G: Labourers' International Union of North America, Local 506 (Applicant) v. Ellis Don Ltd. (Respondent) *(Withdrawn)*

3064-11-G: International Brotherhood of Electrical Workers, Local Union 894 and the IBEW Electrical Power Council of Ontario (Applicant) v. R&B Construction Services Inc. (Respondent) *(Withdrawn)*

3383-11-G: Universal Workers Union, L.i.U.N.A. Local 183 (Applicant) v. Cassavia Estate Homes and/or Cassavia Estate Homes Angus Heights Inc. and/or Cassavia Estate Homes Ltd. (Respondent) *(Withdrawn)*

3607-11-G: Labourers' International Union of North America, Local 1036 (Applicant) v. Limen Group Ltd. (Respondent) *(Withdrawn)*

3943-11-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Polyphase Inc. (Respondent) *(Granted)*

4063-11-G: Labourers' International Union of North America, Local 527 (Applicant) v. Alliance Forming Ltd. (Respondent) *(Withdrawn)*

4064-11-G: Labourers' International Union of North America, Local 527 (Applicant) v. Alliance Forming Ltd. (Respondent) *(Withdrawn)*

0003-12-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ciro Excavating & Grading Ltd. (Respondent) *(Granted)*

0068-12-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Kertech Electric Inc. (Respondent) *(Withdrawn)*

0094-12-G; **0100-12-G**: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. CRO Aluminum Inc. (Respondent); Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Aluminum Pro Inc. (Respondent) *(Endorsed Settlement) (Withdrawn)*

0104-12-G: Essex and Kent Counties Skilled Trades Council (Applicant) v. Greater Essex County District School Board (Respondent) *(Terminated)*

0143-12-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Downsview Drywall Limited (Respondent) *(Granted)*

0198-12-G; **0199-12-G**: International Union of Operating Engineers, Local 793 (Applicant) v. B. Gottardo Construction Ltd. (Respondent) *(Withdrawn)*

0222-12-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Standard Electric (Toronto 1985) Inc. (Respondent) *(Granted)*

0242-12-G: International Union of Operating Engineers, Local 793 (Applicant) v. Centennial Construction & Contracting (Niagara) Inc. (Respondent) *(Withdrawn)*

0362-12-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Schindler Elevator Corporation (Respondent) *(Withdrawn)*

0408-12-G: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Alberici Constructors, Ltd. (Respondent) *(Withdrawn)*

0416-12-G: Universal Workers' Union of North America, Local 183 (Applicant) v. Chita Forming Ltd. (Respondent) *(Withdrawn)*

0417-12-G: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. J.C. Concrete & Drain Ltd. (Respondent) *(Withdrawn)*

0449-12-G: Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Bruce Power LP (Respondent) *(Terminated)*

0459-12-G: United Brotherhood of Carpenters and Joiners of America, Local 2222 (Applicant) v. Crossby-Dewar Projects Inc. (Respondent) *(Withdrawn)*

0460-12-G: Masonry Industry Employers' Council of Ontario/ Ontario Masonry Contractor's Association-BACU Bargaining Committee (Applicant) v. Vito Masonry Ltd. (Respondent) *(Granted)*

0474-12-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Aecon Utilites (Respondent) *(Withdrawn)*

0555-12-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Triple D Electro Ltd. (Respondent) *(Granted)*

0557-12-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Canadian Interior System & Acoustic Company Inc. o/a C.I.S.A.C. (Respondent) *(Granted)*

0602-12-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. C.F. Concrete & Drain Inc. (Respondent) *(Endorsed Settlement)*

0619-12-G: International Union of Elevator Constructors, Local 96 (Applicant) v. ThyssenKrupp Elevator (Canada) Ltd. (Respondent) *(Withdrawn)*

0633-12-G: Labourers' International Union of North America, Local 1059 (Applicant) v. 1247880 Ontario Ltd. o/a R J Excavating (Respondent) *(Granted)*

0634-12-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Chislett Asphalt Roofing Ltd. (Respondent) *(Endorsed Settlement)*

0651-12-G: The International Union of Painters and Allied Trades, Local Union 1795 (Applicant) v. Bluewater Glass Contractors Limited (Respondent) *(Granted)*

0669-12-G: Labourers' International Union of North America, Local 625 (Applicant) v. Jones Group Ltd. (Respondent) *(Granted)*

0685-12-G: Labourers' International Union of North America, Local 527 (Applicant) v. Allstar Concrete Drilling & Sawing Reg. (Respondent) *(Dismissed)*

0686-12-G: International Brotherhood of Painters and Allied Trades, Local Union 1819 (Applicant) v. 975997 Ontario Limited o/a J. Glass & Glazing (Respondent) *(Dismissed)*

0693-12-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Force Wrecking Co. (Respondent) *(Withdrawn)*

0805-12-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 (hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. Edward C. Kosciuch c.o.b. as All City Drywall & Acoustics/ All City Drywall and Acoustics Inc./ All City Drywall Corporation (Respondent) *(Granted)*

0811-12-G; **0812-12-G**: Labourers' International Union of North America, Local 1059 (Applicant) v. London Paving & Concrete Ltd. (Respondent) *(Withdrawn)*

0839-12-G: Labourers' International Union of North America, Local 625 (Applicant) v. Coco Paving Inc. (Respondent) *(Withdrawn)*

0923-12-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lorcon Drywall Ltd. (Respondent) *(Granted)*

0924-12-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lorcon 200 Contracting Ltd. a.k.a. Lorcon Drywall Ltd. (Respondent) *(Granted)*

APPEALS - EMPLOYMENT STANDARDS ACT

3169-10-ES; **3171-10-ES**: Tim Claude Pelletier and Susanne Ingrid Pickhardt o/a T.S. Enterprise/Teastore (Applicant) v. Stefan Audet-Smith and, Director of Employment Standards (Respondent); Tim Claude Pelletier and Susanne Ingrid Pickhardt o/a T.S. Enterprise/Teastore (Applicant) v. Lise Wolyniuk and, Director of Employment Standards (Respondent) *(Granted)*

3752-10-ES: Christopher Whitehead a Director of 6279490 Canada Inc. (Applicant) v. Jatinder Kumar, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3848-10-ES: IBM Canada Limited/IBM Canada Limitée (Applicant) v. Holger Handke and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

4114-10-ES: Ernell Ellis (Applicant) v. Magna Structural Systems Inc. o/a Modatek Systems and, Director of Employment Standards (Respondent) *(Dismissed)*

4230-10-ES: Saadat Hassan (Applicant) v. Moonstone Transport Ltd. and, Director of Employment Standards (Respondent) *(Withdrawn)*

0452-11-ES: Holcim (Canada) Inc. (Applicant) v. Sarah Rogers and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

1404-11-ES: Value Village Stores Inc. (Applicant) v. Niluka Somaratna and, Director of Employment Standards (Respondent) *(Granted)*

1576-11-ES: Derek Wheeler (Applicant) v. Greene's Electric Plumbing & Heating Ltd. and, Director of Employment Standards (Respondent) *(Granted)*

1812-11-ES: Tracks & Wheels Equipment Brokers Inc. (Applicant) v. Craig Craftchick and, Director of Employment Standards (Respondent) *(Dismissed)*

1840-11-ES: 6279490 Canada Inc. o/a e-Dealer (Applicant) v. Jatinder Kumar, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

1908-11-ES: Ramnarine Ramkissoon (Applicant) v. E. J. Industries Ltd. and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

2089-11-ES: Anthony Foderaro, Antonio Foderaro and Giovanni Foderaro as Directors of Peninsula Import Auto Parts Ltd. (Applicant) v. Paul Varona and, Director of Employment Standards (Respondent) *(Dismissed)*

2178-11-ES: Lee P. Sanderson (Applicant) v. Tire Team Centres Inc. and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

2199-11-ES: Rub a Tub Refinishing Ltd. (Applicant) v. Fred Foley and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

2237-11-ES: Timothy P. Charlebois (Applicant) v. JVX Ltd., Director of Employment Standards (Respondent) *(Dismissed)*

2481-11-ES: Money in Motion Inc. (Applicant) v. Brent Holmberg and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

2546-11-ES: Kashlaw Professional Corporation (Applicant) v. Sara Ahmed and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

2556-11-ES: Lorrie Newell aka McGraw, A Director of Private Pleasures Ltd. (Applicant) v. Megan Watts, Director of Employment Standards (Respondent) *(Dismissed)*

2564-11-ES: Stephanie Anderson (Applicant) v. Nancy Deskin, and Director of Employment Standards (Respondent) *(Withdrawn)*

2700-11-ES: Aditya Birla Minacs Worldwide Inc. (Applicant) v. Catherine Raso and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

2777-11-ES: Vast Studios Inc. (Applicant) v. Jeff DeGordick and, Director of Employment Standards (Respondent) *(Granted)*

2778-11-ES: Jeff DeGordick (Applicant) v. Vast Studios Inc. and, Director of Employment Standards (Respondent) *(Dismissed)*

2783-11-ES; **2787-11-ES**: Cassandra Ashley Galloway o/a College Pro Painting (Applicant) v. Stephin Ramos and, Director of Employment Standards (Respondent); Cassandra Ashley Galloway o/a College Pro Painting (Applicant) v. Theodoros Kiatos and, Director of Employment Standards (Respondent) *(Dismissed)*

2966-11-ES: Shirley Nguyen (Applicant) v. Icerok Jewelry Inc. and, Director of Employment Standards (Respondent) *(Dismissed)*

2978-11-ES: Zhiwen Guo (Applicant) v. Sentinel D.E.C. Systems Inc. and, Director of Employment Standards (Respondent) *(Withdrawn)*

3081-11-ES: Alfred Soosaipillai (Applicant) v. Magdello Restaurants Inc. and, Director of Employment Standards (Respondent) *(Dismissed)*

3202-11-ES: Mirko Krajac (Applicant) v. 1297651 Ontario Inc. o/a Bozzo Specialty Foods, Director Of Employment Standards (Respondent) *(Granted)*

3270-11-ES: Birmingham International College of Canada/Cirkel International Inc. (Applicant) v. Ivana Djuric and, Director Of Employment Standards (Respondent) *(Dismissed)*

3344-11-ES: 2169116 Ontario Ltd. o/a Future Paving (Applicant) v. Claudio Bianchi and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3517-11-ES: Benson Group Inc. (Applicant) v. Robert Yurman, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3598-11-ES: William Warner (Applicant) v. Gale's Gas Bars Limited, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3635-11-ES: Bernstein-Shipman Ltd. (Applicant) v Kimberly Woodcox, and Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3689-11-ES: Allin M. R. Brady (Applicant) v. 836171 Ontario Inc. Restoration Environmental Contractors, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3722-11-ES: Parkside Nursery School (Applicant) v. Jessica Pember and, Director of Employment Standards (Respondent) *(Dismissed)*

3738-11-ES: Trevine Joachim (Applicant) v. Unicco Facility Services Canada Company, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3757-11-ES: HCR Personnel Solutions Inc. (Applicant) v. Harold J.(John) Appleby and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3868-11-ES: Aeon Sodding Corp. (Applicant) v. Jeans Thomas, Director Of Employment Standards (Respondent) *(Endorsed Settlement)*

3875-11-ES: New Horizons Car & Truck Rentals Ltd. o/a Discount Car and Truck Rentals (Applicant) v. Solomon Amo-Mensah and, Director of Employment Standards (Respondent) (Endorsed Settlement)

3880-11-ES: Schneider's Computing and Websites Limited (Applicant) v. Joanna Feltz and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3895-11-ES: Naveed Butt (Applicant) v. 2069588 Ontario Inc. Help Unlimited, 1383016 Ontario Inc. and, Director of Employment Standards (Respondent) *(Terminated)*

3910-11-ES: Lucas Powell, a Director of Gold Envision Marketing Inc. (Applicant) v. Justin Clement and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

3962-11-ES: Wai Sing Tai (Applicant) v. Charlie's Meat and Seafood Supply Ltd., Director of Employment Standards (Respondent) *(Endorsed Settlement)*

4021-11-ES: Boston Pizza 1327601 Ontario Inc. (Applicant) v. Rosemary Morano, Director Of Employment Standards (Respondent) *(Endorsed Settlement)*

4023-11-ES: Michigan Roadhouse Inc. (Applicant) v. Ansley K. Bethune and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

4031-11-ES: Peek-A-Bears Child Care Inc. (Applicant) v. Sherry Smith and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

4086-11-ES: Franki Wong (Applicant) v. All-Ways Ontario Express Inc. and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

4088-11-ES: Linh B. Phung (Applicant) v. Rockport Group Developments Inc., and Director of Employment Standards (Respondent) *(Endorsed Settlement)*

4108-11-ES: Eva S. Gooderham, Director of SalesFuel Inc. (Applicant) v. Gregory Longo, and Director of Employment Standards (Respondent) *(Endorsed Settlement)*

4111-11-ES: Brenda Marcinko (Applicant) v. Pat Robinson Inc., Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0152-12-ES: Magna Structural Systems Inc. o/a Formet Industries (Applicant) v. Nicole Gauthier, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0167-12-ES: Phil's Motors Limited (Applicant) v. Robert Mills and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0207-12-ES: Kal Tire Ltd. (Applicant) v. David Bogensberger and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0209-12-ES: Mr. Dairy and Food Distributing Ltd. (Applicant) v. Mark Alarie and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0210-12-ES: Leonid Safir A Director of Anat Incorporated (Applicant) v. Teresa McKibbon, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0231-12-ES: Krome Transportation Inc. (Applicant) v. Iraj Safari, and Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0261-12-ES: Shanan C. Butkovic (Applicant) v. G.R.B. Kelwhitby Inc. o/a Kelsey's Restaurant, and Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0262-12-ES: Garry (Scott) Ellwood (Applicant) v. 682305 Ontario Ltd. o/a Speedy Class (formerly Auto Apple Glass), and Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0322-12-ES: Greg Sheward (Applicant) v. 564980 Ontario Limited operating as Fersina Windows and, Director of Employment Standards (Respondent) *(Withdrawn)*

0353-12-ES: Impression Holding Company Limited (Applicant) v. Mahdokht Sepehrkhouy, and Director of Employment Standards (Respondent) *(Terminated)*

0355-12-ES: Osumex Natural Alternatives Ltd. (Applicant) v. Director of Employment Standards (Respondent) *(Terminated)*

0370-12-ES: 2102097 Ontario Inc. o/a Perfect Cleaners (Applicant) v Ms. Rongjie Zhao, Director Of Employment Standards (Respondent) *(Dismissed)*

0377-12-ES: Top Hand Works Inc. o/a Top Hand Car Rental (Applicant) v. Xiao yu Lu and, Director of Employment Standards (Respondent) *(Terminated)*

0388-12-ES: Linda Catharine Smith (Applicant) v. Jodell Retail Concepts Ltd. o/a The As Seen on TV Store, Director of Employment Standards (Respondent) *(Dismissed)*

0400-12-ES: 1711963 Ontario Ltd. (Applicant) v. Justin Dennis, and Director of Employment Standards (Respondent) *(Withdrawn)*

0433-12-ES: Fataneh Taghepoor (Applicant) v. Hybrid Document Systems Inc., and Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0484-12-ES: Netlinx Communications Inc. (Applicant) v. Jason Mason and, Director of Employment Standards (Respondent) *(Terminated)*

0487-12-ES: Tabassum Zaheeruddin (Applicant) v. Extreme Fitness Inc., and Director of Employment Standards (Respondent) *(Endorsed Settlement)*

0503-12-ES: ZZZ Best Lawn Cutting and Window Cleaning (Applicant) v Director of Employment Standards, Rosita Walkowicz (Respondent) *(Terminated)*

0590-12-ES: 2131875 Ontario Limited (Applicant) v. Mr. Salvatore Galle and, Director of Employment Standards (Respondent) *(Endorsed Settlement)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

2499-11-HS: Elementary Teachers' Federation of Ontario (Applicant) v. Kawartha Pine Ridge District School Board and, Hugh McGuire, Inspector (Respondent) *(Dismissed)*

2681-11-HS: Autoport Limited (Applicant) v. Teamsters Local Union 938 and, A Director under the Occupational Health and Safety Act (Respondent) *(Withdrawn)*

0582-12-HS: Belterra Corporation (Applicant) v. A Director under the Occupational Health and Safety Act (Respondent) *(Terminated)*

0652-12-HS: Agriculture Technology Incorporated (Applicant) v. (Respondent) *(Dismissed)*

0790-12-HS; **0791-12-HS**: ReiTech Corporation (Applicant) v. A Director under the Occupational Health and Safety Act (Respondent); ReiTech Corporation (Applicant) v. Peel District School Board, A Director under the Occupational Health and Safety Act (Respondent) *(Dismissed)*

0941-12-HS: Bethany Lodge (Applicant) v. A Director under the Occupational Health and Safety Act (Respondent) *(Withdrawn)*

LAST OFFER VOTE

4103-11-RV: NORAMPAC TRENTON, a Division of Cascades Canada ULC (Applicant) v. Communications, Energy and Paperworkers Union of Canada, Local 1470 (Respondent) *(Withdrawn)*

PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT, 1997

0692-11-PS: Ontario Public Service Employees Union (Applicant) v. Grey Bruce Health Unit and, Grey Bruce Health Services (Respondent) *(Withdrawn)*

REFERRAL FROM MINISTER (SECTION 115)

0174-12-M: Unilever Canada, a Division of Unilever Inc. (Applicant) v. United Food and Commercial Workers Canada, Local 175 (Respondent) *(Dismissed)*

SECTOR DETERMINATION (SECTION 153)

3829-11-M: Brick and Allied Craft Union of Canada, Local 31 (Applicant) v. Brick and Allied Craft Union of Canada, Local 2 and International Union of Bricklayers and Allied Craftworkers, Local 2 and, Gemstar Group (Respondent) v. Masonry Industry Employers' Council of Ontario ("MIECO") Ontario Masonary Contractors' Association - BACU Bargaining Committee ("OBBC") (Intervener) *(Withdrawn)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0173-10-R; Tony Lunardo and Nixon Brown, (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46; Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; and Plumbers Residential Council, Ontario, (Respondent) v. Lunardo Plumbing Inc. (Intervener). (*Granted*)

3323-10-ES; John Skwarek, (Applicant) v. Repower Automotive Services Inc. and Director of Employment Standards, (Respondent). (*Granted*)

1690-11-G: Canadian Union of Skilled Workers (Applicant) v. Hydro One Inc. (Respondent) *(Dismissed)*

2290-11-U; Annabella Louro, (Applicant) v. Canadian Union of Public Employees and its Local 1483, (Respondent) v. Dufferin-Peel Catholic District School Board and Richard Moriah (Intervener). (*Dismissed*)

3013-11-ES; Ayra Dzhembazka o/a AD Trucking, (Applicant) v. Gencho Genov and Director of Employment Standards (Respondent) (*Dismissed*)

3386-11-U; **0454-12-U**: D. B. Norman (Applicant) v. CAW Canada Local 1941 (Respondent) v. Mahle Filter Systems Canada ULC (Intervener); D. B. Norman (Applicant) v. Mahle Filter Systems Canada, ULC (Respondent) *(Dismissed)*

3541-11-U: Denise Auclair (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union (CAW Canada) and its Local No. 27 (Respondent) v. Autoneum Canada Ltd. (Intervener) *(Dismissed)*

3685-11-R: Operative Plasterers' and Cement Masons' International Association of the United States and Canada Local Union 598 (Applicant) v. Clifford Masonry Limited/, Clifford Restoration Limited, sometimes operating as Clifford Group (Respondent) v. Brick and Allied Craft Union of Canada (Intervener) *(Granted)*

0246-12-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Limen Group Ltd. (Respondent) v. Ontario Masonry Contractors' Association, Brick and Allied Craft Union of Canada (Intervener) *(Granted)*

CASE LISTINGS JULY 2012

(not included in this issue)

Ontario Labour Relations Board,
505 University Avenue,
Toronto, Ontario
M5G 2P1

ISSN 0383-4778